25

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]. 1912.

No. [redacted]66.

RALPH A. EWING, PLAINTIFF IN ERROR,

vs.

THE CITY OF LEAVENWORTH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JUNE 1, 1910.

(22,208)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 309.

RALPH A. EWING, PLAINTIFF IN ERROR,

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THE CITY OF LEAVENWORTH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

Be it remembered, that on the 26th day of August, 1908, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas an assignment of errors, notice of appeal, and transcript of the record of the district court of Leavenworth county, in the case of The City of Leavenworth, appellee v. Ralph Ewing, appellant, No. 16127, which assignments of error, notice of appeal and transcript of the record are in words and figures as follows: to-wit:—

2 Filed Aug. 26, 1908. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 16127.

THE CITY OF LEAVENWORTH, Appellee,
vs.
RALPH EWING, Appellant.

Assignment of Errors.

Comes now the appellant and presents his assignment of errors in the above entitled appeal as follows, to-wit:—

1st. The court erred in rendering the judgment against the appellant, defendant below, Ralph Ewing.

2nd. The court erred in permitting in evidence the city ordinance in the transcript of record No. 2367.

3rd. The court erred in admitting in evidence Section 1 and that part of section 2, referring to express companies, and Sections 4 and 5 of ordinance No. 2367.

4th. The court erred in rendering judgment against the appellant on the evidence under said ordinance No. 2367 for the reason that said ordinance is null and void.

5th. The court erred in rendering judgment against the appellant, Ralph Ewing, under Sections 1, 2, 4 and 5 of said Ordinance No. 2367 for the reason that said sections of said ordinance are unconstitutional null and void.

6th. The court erred in rendering judgment against appellant, Ralph Ewing, for the reason that said judgment is contrary to law.

7th. The court erred in rendering judgment against appellant, Ralph Ewing, for the reason that said judgment is contrary to the evidence.

8th. That part of Section 2 of Ordinance No. 2367 pur-
3 porting to tax the business of express companies, and under which appellant Ralph Ewing, was fined, reads: "The sum of fifty dollars per year on the business and occupation of express com-

pany, corporation or agency, in receiving packages in this City from persons in this City and transmitting the same by express from this City within this state to persons and places within this State, and receiving in this City packages by express transmitted within this State from persons and places in this State to persons within this City and delivering the same to persons in this City, etc." (page 6). The Court erred in rendering judgment against appellant under this section of said ordinance for the reason that the evidence shows the United States Express Company did no such business.

9th. If the court should hold that the company did such business, then under the evidence herein (Pages 17 and 18 of record) said ordinance as applied to said company is unreasonable, oppressive and void, and the court erred in rendering judgment herein against appellant.

10th. The court erred in rendering judgment against appellant, Ralph Ewing, for the reason that the United States Express Company did no business within the City of Leavenworth, taxable under said ordinance No. 2367.

11th. The court erred in rendering judgment against appellant, Ralph Ewing, for the reason that all of the business of The United States Express Company in and out of the City of Leavenworth is necessarily carried through the State of Missouri, and is inter-state commerce.

12th. The court erred in not rendering judgment for the appellant, Ralph Ewing, under the evidence as introduced.

13th. The court erred in not sustaining the demurrer to the evidence introduced by appellant.

14th. The court erred in over-ruling the motion for a new tiral.

JNO. T. O'KEEFE,
Attorney for Appellant.

Filed Aug. 26, 1908.

D. A. VALENTINE,
Clerk Supreme Court.

4 Clerk Supreme Court:

Issue summons in the above entitled case directed to the sheriff of Leavenworth county, Kansas, returnable according to law.

JOHN T. O'KEEFE,
Att'y for Appellant

5 Filed Aug. 26, 1908. D. A. Valentine, Clerk Supreme Court.

STATE OF KANSAS,
Leavenworth County, ss:

In the District Court in and for Said County.

THE CITY OF LEAVENWORTH, Plaintiff,
vs.
RALPH EWING, Defendant.

Bill of Exceptions.

Be it remembered, that on the 25th day of March, 1908, there was filed in the Police Court of the City of Leavenworth, Leavenworth County, Kansas, a complaint, charging Ralph Ewing, Agent of the United States Express Company at Leavenworth, Kansas, with a violation of license tax ordinance No. 2367, of the City of Leavenworth. A warrant was issued for his arrest. He was arrested, tried in the Police Court, found guilty, and adjudged to pay a fine of $50.00 to the City of Leavenworth, and be committed until the judgment be complied with and the fine paid. He duly appealed to the District Court of Leavenworth County, Kansas. A proper and sufficient appeal bond was given and the case duly and legally certified and appealed to the District Court of Leavenworth County, Kansas. A copy of the Transcript, Complaint, Warrant and the Ordinance No. 2367 of the City of Leavenworth are in the words and figures following to-wit:

6 Filed Aug. 26, 1908. D. A. Valentine, Clerk Supreme Court.

STATE OF KANSAS,
City and County of Leavenworth, Police Court, ss:

In Police Court.

CITY OF LEAVENWORTH, Plaintiff,
vs.
R. EWING, Agent of U. S. Express Company, Defendant.

Transcript.

On the 26th day of March 1908, the above named defendant, R. Ewing, Agent, was brought into said court upon the charge of conducting, carrying on and managing an express business as agent of the United States Express Company, a corporation in violation of Ordinance Number 2367 of said City. The city was represented by J. H. Wendorff City Attorney and the defendant was present in person and by John T. O'Keefe, Attorney.

The following orders were made in the case:

Continued to April 4th, 1908.

Continued to April 6th, 1908.

On the 6th day of April 1908, the case came on for trial, on written complaint, the city being present by attorney, and defendant being present in person and by attorney.

The following named witnesses were duly sworn and testified in behalf of the city:

—— ——.

—— ——.

The following named witnesses were duly sworn and testified in behalf of the defendant:

—— ——.

—— ——.

After hearing the evidence in the case and the arguments of counsel both on behalf of the city and the defendant, and being fully advised in the premises, the court found the defendant guilty of conducting, carrying on and managing an express business as agent of the United States Express Company a corporation, in violation of Ordinance Number 2367 of said city of Leavenworth, Kansas, as charged in the complaint; whereupon, it was ordered and adjudged that the defendant, R. Ewing, Agent, pay a fine of $50.00 and be imprisoned in the city jail for a period of — days, and pay the costs of the case, assessed at $— and stand committed until the judgment of the court be complied with.

Whereupon, the defendant gave notice of appeal to the District Court of said county, which appeal was granted and the bond fixed by the court at $100.00.

Bond was filed in the sum of $100.00 with Ralph A. Ewing as principal and J. M. Allen as surety, and approved by the Judge of said Court on the 7th day of April 1908. The following papers are herewith filed with the Clerk of the District Court aforesaid which are all of the papers filed in said case.

Complaint, Warrant and Appeal Bond.

I, F. K. Taylor, Judge of said Police Court, hereby certify that the above is a true and correct transcript of the proceedings had before me in the above entitled case, and that the papers herewith
7 attached are the original papers in the case.

Dated April 17th, 1908.

F. K. TAYLOR,

Police Judge of the City of Leavenworth.

Endorsed: No. —. Leavenworth County District Court. State of Kansas vs. Ralph Ewing, Agent. Transcript. Filed April 17, 1908. R. G. McFarland, Clerk District Court.

8 *Complaint.*

STATE OF KANSAS,
County of Leavenworth,
City of Leavenworth, ss:

In Police Court in and for said City.

THE CITY OF LEAVENWORTH, Plaintiff,
vs.
RALPH EWING, Defendant.

John Riley being first duly sworn, makes this complaint and deposes and says: That on the 24th day of March, A. D. 1908, in the city and county aforesaid, the said defendant, Ralph Ewing, who was then and there the agent of The United States Express Company, a corporation, then and there being did unlawfully conduct, carry on and manage, as such agent of the United States Express Company, the business of said The United States Express Company by receiving packages in said City of Leavenworth from persons in said City and transmitting the same by express from said City within the State of Kansas, to persons and places within the State of Kansas, and receiving in said City packages transmitted by express within the State of Kansas, from persons within the State of Kansas and delivering the same to persons within said City, except the receipt, transmission and delivery of such packages to and from any department, agency or agent of the United States, and except the receipt, transmission and delivery of any such packages which constitute and are inter-state commerce, without first paying into the City treasurer of said City the sum of Fifty Dollars and taking a License therefor for the conducting, carrying on and managing said business in said City of Leavenworth.

All of which is contrary to the form, force and effect of the ordinances of said City in such case made and provided.

Complainant therefore prays that a warrant be issued for the arrest of the said defendant, and that he be dealt with according to law.

JOHN RILEY.

Subscribed and sworn — before me this 25" day of Mar. A. D. 1908.

F. K. TAYLOR, *Judge.*

I, T. K. Taylor, Judge of said Police Court, hereby certify that the above is the original complaint in said case.

Dated April 17, 1908.

F. K. TAYLOR,
Police Judge of the City of Leavenworth.

Endorsed: Complaint. The City of Leavenworth vs. Ralph Ewing, Agent of U. S. Express Co. Witnesses. John Riley. March 25, 1908. T. K. Taylor, Police Judge of the City of Leavenworth. Dated Apr. 17, 1908. R. G. McFarland, Cl'k Dist. C'rt.

9 THE STATE OF KANSAS,
City and County of Leavenworth, ss:

Police Court.

The State of Kansas to the Chief of Police of the City of Leavenworth, Greeting:

Whereas, John Riley has made complaint upon oath, before me the undersigned Judge of said Court; that on the 24" day of March, A. D. 1908 at and within the City and County of Leavenworth, State of Kansas, one Ralph Ewing Agent of the United States Express Company a Corporation did then and there unlawfully conduct, carry on and manage, as such agent of the United States Express Company, the business of said Company by receiving packages in said City of Leavenworth from persons in said City and transmitting the same by express from said City within the State of Kansas, and receiving in said City packages transmitted by express within the State of Kansas from persons within the State of Kansas, and delivering the same to persons within said City, except the receipt, transmission and delivery of any such packages which constitute and are inter-state commerce without first paying to the City treasurer of said City the sum of Fifty Dollars and taking a license therefor for the conducting, carrying on and managing said business in said City of Leavenworth.

Therefore, these are to command you forthwith to apprehend the said Ralph Ewing, Agent of the United States Express Company and bring him before said Court in said City, to be dealt with according to law.

Witness my hand, this 25" day of March A. D. 1908.

F. K. TAYLOR.
Police Judge.

I, F. K. Taylor, Judge of said Police Court, hereby certify that the above is the original Warrant in said case. Dated April 17, 1908.

F. K. TAYLOR,
Police Judge of the City of Leavenworth.

(Endorsed:) Police Court. City of Leavenworth. Ralph Ewing, Agent for U. S. Express Co. Defendant. Warrant. Received this Writ on the 25 day of March 1908, and served the same by arresting the within named Ralph Ewing and bringing him before the court. J. A. Cranston Chief of Police. By John Riley Patrolman. Filed 25 day of March 1908. F. K. Taylor, Police Judge. Filed Apr. 17 1908. R. G. McFarland, C'lk Dist. Court.

10 *Ordinance No. 2367.*

An Ordinance for the Regulation of Occupations, Trades, Professions and Callings Therein Named and Providing for the Levy of a License Tax Thereon, and Repealing Ordinance Number 2365.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth.

SECTION 1. That no person, firm or corporation either as principal or agent, shall carry on or conduct or manage any business, occupation, trade, profession, or calling hereinafter mentioned within the city of Leavenworth, without first paying into the City Treasury the sums named hereinafter and taking a license therefor as provided in the Ordinance.

SECTION 2. Every person or corporation or firm carrying or conducting the business of mercantile agency or reporting the commercial standing of business men shall pay a yearly license tax of twenty-five dollars.

Pawnbrokers shall pay a yearly license tax of fifty dollars; any person, firm or corporation engaged in the business of loaning money on chattel security where the chattel is taken into the possession of the lender, or a bill of sale or other written instrument is taken in lieu of said possession, shall be considered a pawnbroker under this ordinance.

The sum of fifty dollars per year on the business and occupation of receiving messages in this city from persons in this city and transmitting the same by telegraph from this city within this state to persons and places within this state; and receiving in this city messages by telegraph transmitted within the state from persons and places in this state to persons within this city and delivering same to persons in this city, excepting the receipt, transmission and delivery of any such messages to and from any department, agency or agent of the United States and excepting the receipt, transmission and delivery of any such messages which are interstate commerce; the business and occupation of receiving, transmitting and delivering of the messages herein excepted is not taxed hereby.

11 The sum of fifty dollars per year on the business and occupation of Express Company, corporation, or Agency, in receiving packages in this City from persons in the city and transmitting the same by express from this City within this State to persons and places within this state, and receiving in this City packages by express transmitted within the State from persons and places in this state to persons within this City and delivering the same to persons in this City excepting the receipt, transmission and delivery of any such packages to and from any department, agency or agent of the United States, and excepting the receipt, transmission and delivery of any such packages which are interstate commerce; the business and occupation of receiving, transmitting and delivering of the packages herein excepted is not taxed hereby.

Every Electric Light Company or corporation shall pay the sum of One Hundred Dollars per annum; every Gas or Light and Heating Company, or corporation, One Hundred Dollars per annum; Every telephone company or corporation for business done exclusively within the City of Leavenworth One Hundred Dollars per annum.

Every person or corporation engaged in the business of furnishing water to the citizens of this city, for pay, by means of pipes laid in the streets of this city, shall pay the sum of One Hundred Dollars per annum.

Ticket brokers shall pay a license tax of One Hundred Dollars per annum. Every Grain Exchange shall pay a license tax of Fifty Dollars per annum.

The proprietor or manager of every public hall shall pay a license tax of twenty five dollars per annum; every circus, menagerie or exhibition of trained animals, either domestic or wild, shall pay a license tax of $100.00 per day; side show connected with or following the circus or menagerie twenty-five dollars per day; street show museum or other shows not herein enumerated, five dollars per day, or one hundred dollars per annum; opera house, theater or skating rink, one hundred dollars per annum.

Every person keeping for gain or profit any billiard table, pool table, bowling alley or shooting gallery shall pay a yearly
12 license tax for billiard or pool tables five dollars each for each per year; bowling alley fifteen dollars per year, shooting gallery twenty-five dollars per annum.

Every Fire or Life Insurance Company, doing business in this City, shall pay a license tax of fifty dollars per annum.

Every Plate Glass, Accident, Guaranty, Surety or Liability, Casualty, Steam Boiler, Live Stock, Tornado, or Cyclone Company, writing Insurance under less than two heads, doing business in this City, shall pay a license tax of Twenty-five Dollars per annum.

Every Plate Glass, Accident, Guaranty, Surety or Liability, Casualty Steam Boiler, Live Stock, Tornado or Cyclone Company, writing Insurance under more than two heads, doing business in this City, shall pay a license tax of Fifty Dollars per annum.

Every peddler shall pay a license tax of fifty dollars per year. Every huckster shall pay a license tax of twenty-five dollars per year. The term huckster is hereby defined--mean a person engaged in the business of gathering up from the producer at the home of the producer and selling or peddling Country produce only.

Every bill poster shall pay a yearly license tax of fifteen dollars; every fortune teller, clairvoyant or mind reader shall pay a yearly license tax of ten dollars; every sl-ight of hand performer shall pay a tax of five dollars per day.

Every person carrying on a gift enterprise or prize package business shall pay a license tax of five dollars for every day such business shall be followed.

Every corn doctor shall pay a monthly license tax of ten dollars.

The proprietor of every lung tester, muscle tester or developer shall pay a monthly license tax of ten dollars.

Every sewing machine agent shall pay a license tax of fifteen dollars per annum.

Slot machines which are not gambling devices, each $10.00 per year.

Any person, firm or corporation, or any agent or drummer representing such person firm or corporation, opening up a temporary
13 place of business or sample room in Leavenworth City for the purpose of selling goods by sample shall pay a license tax of $20.00 per day for first ten days and $10.00 per day for each day thereafter.

Every Street Railway Company, or corporation, shall pay a license tax of One Hundred Dollars per annum, or fifty dollars for six (6) months.

Gasoline light, persons or corporation engaged in the business of furnishing gasoline street lights to the City of its citizens for pay, for each six months, Twenty-Five Dollars.

Gas manufacturer, persons or corporations engaged in the business of making or selling gas, not having mains in the streets or alleys, of this City, for each six months Fifty Dollars.

Soliciting orders for the future delivery of goods, wares or merchandise from stocks not carried or otherwise taxed in the City of Leavenworth, ten dollars per month, or One Hundred Dollars per year.

SECTION 3. Every person, firm or corporation engaged in any gift enterprise, or in selling, giving away or in any manner disposing of premium stamps, coupons or tickets of any kind, or in any way offering prizes, rewards or emolument for the purpose of stimulating their own or any other person's trade, Five Dollars per month, payable monthly.

Every person selling or offering for sale medicine or medical remedies on the streets of this City shall pay a license tax of ten Dollars per week.

Every person selling or offering for sale, fruits, vegetables, or produce on the streets of this city shall pay a license tax of thirty dollars per month.

Every person selling or offering for sale any goods, wares and merchandise other than fruits, vegetables and produce on the streets of this City shall pay a license tax of ten dollars per week.

Every person conducting a cane rack, ball throwing, knife throwing or other like business shall pay a license tax of five dollars per month.

Every person soliciting or canvassing for orders for goods, wares and merchandise, shall pay a license tax of twenty-five dollars per annum: fifteen dollars for six months or eight dollars for three months.

14 Every person engaged in the calling or business of going from house to house within this City and selling or offering for sale, goods wares and merchandise upon the "installment plan" to be delivered at some future time, shall pay a license tax of twenty-five dollars per annum: fifteen dollars for six months or eight dollars for three months.

Every person soliciting or canvassing for orders, for goods, wares and merchandise or engaged in the calling or business of going from house to house and selling or offering for sale goods, wares and merchandise to be delivered at some future time for business done exclusively within the City of Leavenworth, and not including any business done to or from points without the State shall pay a license tax of twenty-five dollars per annum, fifteen dollars for six months, or eight dollars for three months.

SECTION 4. Every person, firm or corporation required by this ordinance to pay a license tax shall pay the same to the City Treas-

urer before conducting or carrying on such business, occupation or calling, except payments which are to be made in advance of the time of exercising such privilege and shall take a receipt therefor and deposit the same with the City Clerk who shall issue a license to such persons signed by himself and the Mayor of the City, describing the business, occupation or profession for which such license shall be given.

SECTION 5. Every person who shall violate any of the provisions of this ordinance shall, on conviction thereof, be deemed guilty of a misdemeanor and be fined in any sum not less than the amount of the license required to be paid, nor more than double the amount thereof.

SECTION 6. That Ordinance number 2365 is hereby repealed provided that this repeal shall not affect any license heretofore granted nor discharge any penalty heretofore incurred.

SECTION 7. This Ordinance shall take effect and be in force from and after its approval and publication.

Approved July 17th, 1902.

JEPTHA D. RYAN, *Mayor.*

Attest:

M. A. PRZYBYLOWICZ,
City Clerk.

15 Be it further remembered, that this cause came duly on for hearing in the District Court of Leavenworth County, Kansas; the plaintiff appearing by John H. Wendorff, the City Attorney for Leavenworth, the defendant appearing in his own proper person and by John T. O'Keefe, his attorney, and thereupon the defendant moved to quash the complaint and warrant herein and to dismiss this cause for the reason that the complaint and warrant failed to state a public offense as against the plaintiff which motion was by the court over-ruled, to which defendant duly excepted; and thereupon the defendant being duly arraigned he plead not guilty and a jury being waived the trial of this cause was proceeded with before the court, and thereupon the plaintiff introduced the transcript, complaint, warrant and ordinance No. 2367, in evidence herein and the testimony of the witnesses, John Riley and J. H. Kirmeyer, which testimony is as herein set out, thereupon plaintiff rested and the defendant duly demurred to the evidence of plaintiff for the reason that the evidence of plaintiff failed to show a public offense on the part of the defendant, which demurrer was by the court over-ruled, to which defendant duly excepted; thereupon the defendant on his own behalf offered and introduced his own evidence as is herein set out. And the court having heard the evidence and the arguments of counsel thereon took this case under advisement.

The transcript, complaint, warrant and ordinance No. 2367 is as herein set out. Following is all of the testimony of John Riley and J. H. Kirmeyer and Ralph Ewing, showing rulings and exceptions. This was all the evidence tendered or offered by either party, or received by the court, being all of the evidence in the case.

16 And thereupon, to sustain the issues on their part the City of Leavenworth, plaintiff, offered and introduced the following testimony and other evidence:

JOHN RILEY, of lawful age, a witness called on behalf of the City of Leavenworth, plaintiff, was duly sworn and testified as follows:

Direct examination, Mr. Riley, by Mr. WENDORFF:

Q. What is your name?
A. John Riley.
Q. What official position did you occupy previous to the 1st of May 1908?
A. City Collector.
Q. Do you know the defendant, Mr. Ewing?
A. Yes sir.
Q. What was his business then?
A. He represented to me that he was the agent of the United States Express Company.
Q. Where was their place of business?
A. On Delaware street, between 4th and 5th on the north side of the street.
Q. State whether or not the United States Express Company maintains an office here?
A. It did at that time on Delaware street, yes sir, and does yet.
Q. State whether or not they did a general express business?

Mr. O'KEEFE: That question is objected to as assuming that they did a general express business. (Question withdrawn.)

Q. State just what they did and what you saw?
A. The only thing I seen was when I was in there was packages coming in; I did not know where they came from or whether they came from the wagon or not; I seen a few packages come in.
Q. Did you see the packages in the office?
A. I could not say that I did now.
Q. State whether or not there was a wagon there?
A. Yes sir.
Q. State whether or not it had the name of the company on it?
A. Yes, I think it did.

17 Q. What were the signs on the windows?
A. The name printed on the windows,—I think on the window to the west side of the front of the building, were the words "United States Express Company," and on the other side the Rock Island Ticket Office, if I am not mistaken.
Q. Did you have a talk with Mr. Ewing about the express business?
A. I notified him some time in January, along about the 15th I think it was, or 16th,—somewhere along there,—that his license would be due the first of February, and he said he would take it up with the Company; so I looked up my books and I seen they were not due until the 16th of February, so I did not go around any more until after the 16th of February.

Q. Was it before the filing of this complaint?
A. Yes sir, and he told me that he had written to the Company and that he had not received any answer.
Q. What did he say about doing an express business and receiving packages and delivering, etc.?
A. Well, I could not say just what he did say, but after I went in to see him why we generally had a friendly little chat,—I do not remember what was said.
Q. The substance.
A. He did not deny being the agent for the express company.
Q. Did he say that he was the agent of the United States Express Company?
A. Yes sir.

Mr. O'KEEFE: That will be admitted that he was the agent of the United States Express Company in the city of Leavenworth, Kansas

The COURT: Do you know that they received packages from outside the state?

A. I could not tell you.

Mr. O'KEEFE (resuming): We concede that Mr. Ewing was the agent of the United States Express Company in the city of Leavenworth, Kansas.

18 J. H. KIRMEYER, of lawful age, a witness called on behalf of the City of Leavenworth, plaintiff, was duly sworn and testified as follows:

Direct examination—Mr. KIRMEYER—by Mr. WENDORFF:

Q. What is your name?
A. J. H. Kirmeyer.
Q. And your official position?
A. City Clerk of Leavenworth City, Kansas.
Q. Have you in your possession a copy of the ordinances of the city of Leavenworth?
A. Yes sir.
Q. Will you turn to that and tell the number of the ordinance in question?

Mr. O'KEEFE: We object to the introduction of it in evidence as incompetent, irrelevant and immaterial and for the reason further that it has no bearing upon this particular case.
The COURT: Objection over-ruled.
To the court's ruling defendant Excepted.

Q. Is this the ordinance you have here (indicating)?
A. Yes sir.

Mr. WENDORFF: We introduce this ordinance in evidence, being numbered 2,367, entitled "An ordinance for the regulation of occupations, trades, professions, etc. etc. and repealing ordinance No. 2305. Passed July 16, 1902, published July 17, 1902, approved July 17, 1902."

Which said ordinance so introduced over defendant's objections and exceptions was, for the purpose of identification, designated as Plaintiff's Exhibit "A", a copy whereof is hereto appended:

19 Thereupon, to sustain the issues on his part, the defendant, offered and introduced the following testimony and other evidence:

RALPH EWING, of lawful age, the defendant, being called as a witness on behalf of the defense, was duly sworn and testified as follows:

Direct examination—Mr. EWING—by Mr. O'KEEFE:

Q. What is your name?
A. Ralph Ewing.
Q. You are the agent of the United States Express Company in the city of Leavenworth, Kansas?
A. Yes sir.
Q. And have been agent for how long?
A. It will be three years the 2nd of August of this year.
Q. And the United States Express Company does business over what railroad in and out of the city of Leavenworth, Kansas?
A. The Chicago, Rock Island & Pacific.
Q. The Chicago, Rock Island and Pacific Railroad comes into the city of Leavenworth how?
A. It comes in over the new bridge over the Missouri river from the state of Missouri.
Q. And during all of that time it has been doing the same way?
A. Yes, during the three years that I have been agent here.
Q. Have you any other road in and out of the city excepting the Chicago, Rock Island & Pacific Railroad?
A. No, none.
Q. Now the packages that you may send to any point in the state of Kansas from Leavenworth, Kansas, or receive from any point in the State of Kansas, consigned to Leavenworth, Kansas, necessarily come in and go out over the Rock Island road,—is that true?
A. That is true, certainly.
Q. A package that you would send say from here to Atchison, Kansas, would be carried how?
A. It would be loaded on the Chicago, Rock Island & Pacific train at the union depot and carried across the new Missouri river bridge through Missouri to Beverly, Missouri and transferred at
20 Beverly, Missouri, and carried to Rushville, Missouri, and transferred at Rushville and carried over the Chicago, Rock Island & Pacific Railroad from Rushville, Missouri, into Atchison, Kansas, and then delivered at Atchison, Kansas.
Q. How much of that transportation,—say it is about 35 or 40 miles between here and Atchison the way that road runs,—how much of that transportation would be in the state of Kansas?

Mr. WENDORFF: That is objected to as incompetent, irrelevant and immaterial.

The COURT: Objection over-ruled.
To the court's ruling plaintiff Excepts.

A. About one mile in the state of Kansas.

Q. Now how about a package that was consigned from Leavenworth, Kansas, to Kansas City, Kansas,—how would that be carried?

A. That would be loaded on the Chicago, Rock Island & Pacific Railroad down here at the Union depot and carried across the new Missouri river bridge to Beverly, Missouri and carried over the Rock Island and leased lines from Beverly, Missouri, to Kansas City, Missouri, and there turned over to some other connecting company for them to make delivery from Kansas City, Missouri, to Kansas City, Kansas.

Q. How much of that transit would be within the state of Kansas?

Mr. WENDORFF: That is objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.
To the court's ruling plaintiff excepted.

A. I should judge there would be about three miles in the state of Kansas, but a part of that would be the connecting company from Kansas City, Missouri, over to Kansas City, Kansas.

Q. How much of the transit, so far as the United States Express Company is concerned, would be within the state of Kansas?

21 Mr. WENDORFF: That is objected to as incompetent, irrelevant and immaterial.

A. About one mile.

Q. Now then Mr. Ewing, take a package that is consigned from Leavenworth Kansas, say to any point west of Atchison, or, say to Topeka, Kansas, for instance,—how would that be carried?

A. That might be carried two ways, one of them by loading at the Union Depot on the Rock Island train and carrying it across on the Missouri river bridge through Missouri to Beverly, Missouri, and over the Rock Island and leased lines from Beverly to Rushville, Missouri, and from Rushville, Missouri, over the Rock Island into St. Joseph, Missouri, and from St. Joseph, Missouri, over the Rock Island to Topeka, and transferred at Topeka, Kansas, to the outward trains there over the Rock Island and into the State of Kansas.

Q. Do you either receive or consign any package from any point, or to any point, in the state of Kansas, that is not carried through the State of Missouri or into the state of Missouri?

A. No sir, we do not.

Q. So all of the Kansas business must necessarily go through the state of Missouri?

A. Yes sir.

Q. This complaint was sworn to on the 25 day of March, 1908. Now do you do any other business besides the business that you receive from or consign to points in the state of Kansas?

A. Yes sir, we receive and forward to all the other states, almost, in the United States.

Q. And to foreign ports?
A. Yes sir.
Q. You prepared some figures, Mr. Ewing, at my suggestion, I believe, as to the business that is received from the state of Kansas or consigned points in the state of Kansas. Now let me ask you
22 about what per cent of your business would be called "State business' even though it goes through the state of Missouri?

Mr. WENDORFF: That is objected to as incompetent, irrelevant and immaterial.
The COURT: Objection is over-ruled.
To the court's ruling plaintiff excepts.

Q. About what per cent?
A. Well, I could not give the exact figures, but I should judge about 10 per cent.
Q. Would it be possible, Mr. Ewing, for the United States Express Company, to maintain an office in this city upon the Kansas business, even though it passes through the state of Missouri?

Mr. WENDORFF: That is objected to as incompetent, irrelevant and immaterial.
The COURT: Objection over-ruled.
To the court's ruling plaintiff Excepts.

A. No sir.
Q. Now is it possible for the United States Express Company to carry a package or receive a package from any point in the state of Kansas without it passing through the state of Missouri.
A. No.

Cross-examination—Mr. EWING—by Mr. WENDORFF:

Q. You do receive packages in the city and send them to points in Kansas do you not?
A. Yes sir.
Q. And you also receive packages by express in the city of Leavenworth and deliver them in the city of Leavenworth that have been sent from cities in Kansas?
A. Yes sir.
Q. And you did prior to the filing of this complaint on the 25th of March, 1908?
A. Yes sir.
23 Q. During the month of March, prior to the filing of this complaint, you had received packages in the city and delivered them in the city that had been sent from places in Kansas?
A. Yes sir.
Q. And received packages in the city here and sent them to places in Kansas?
A. Yes sir.
The COURT: Your business done within Kansas, strictly speaking,—received in Kansas for transport and delivery within Kansas,—you say does not constitute more than 10 per cent of your business?

Mr. WENDORFF: That is objected to as incompetent, irrelevant and immaterial.

The COURT: Over-ruled.

To the court's ruling plaintiff excepts.

A. Yes, about 10 per cent I believe.

The COURT: And for that business alone, the business or office could not be maintained with profit?

Mr. WENDORFF: That is objected to as incompetent, irrelevant and immaterial, and for the reason that it is calling for the conclusion of the witness.

The COURT: Objection over-ruled.

To the court's ruling the plaintiff excepted.

A. No sir.

Redirect examination—Mr. EWING—by Mr. O'KEEFE:

Q. Mr. Ewing, has the United States Express Company any business that is done wholly within the City of Leavenworth?

A. No sir.

Q. Do you receive a package at your office from one point in the City to deliver within the City?

A. No sir.

Q. Have you any business that is done within the City—from one point to another point within the City of Leavenworth?

24 A. No sir, we have not.

The COURT: Suppose you take packages in the City to be delivered in the other parts of the state?

A. Yes, but it goes through Missouri.

25 Be it further remembered, that thereafter and on the 27th day of June, 1908, the court having heretofore taken this cause under advisement and being duly informed, after deliberation, finds the ordinance in question is valid and further finds the defendant guilty, to which the defendant duly excepted and filed his motions for a new trial, and arrest of judgment, which motions were by the court after argument and due consideration over-ruled, to which defendant duly excepted.

And thereupon it was considered, ordered and adjudged by the court that the defendant was guilty and that the defendant pay a fine of $50.00 to the City of Leavenworth, and that he be committed to the jail of the City of Leavenworth, until such fine be paid together with costs, to all of which rulings, orders and judgments of the court said defendant at the time then and there duly excepted and gave notice to the attorney for plaintiff and to the clerk of the District Court of Leavenworth County, Kansas, that he appealed from said judgment to the Supreme Court of the State of Kansas, which notice was duly and legally served on the attorney for plaintiff, and the clerk of the District Court of Leavenworth County, Kansas, and service acknowledged in open court.

And thereupon, upon the application of the defendant all parties consenting in open court, 90 days' time was duly given said defend-

ant to make and present his Bill of Exceptions herein for the Supreme Court of the State of Kansas; a copy of the Journal Entries herein, and of the Notice of Appeal together with the Acknowledgment of Service are in the words and figures following to-wit:

26 MAY 25TH, 1908.

No. 3868.

THE CITY OF LEAVENWORTH, Plaintiff,
against
RALPH EWING, Defendant.

On this 25th day of May A. D. 1908 came the plaintiff herein by J. H. Wendorff, Esq. City Attorney and also came the defendant herein by John T. O'Keefe, Esq. his attorney and by consent of both parties, it is ordered by the Court that a jury be and is hereby waived herein, and this cause is submitted to the Court for trial.

27 JUNE 1ST, 1908.

No. 3868.

THE CITY OF LEAVENWORTH, Plaintiff,
against
RALPH EWING, Defendant.

Upon application of the parties hereto it is ordered by the Court that this case be and the same is hereby set for trial on June 8th, 1908.

28 JUNE 9TH, 1908.

No. 3868.

THE CITY OF LEAVENWORTH, Plaintiff,
against
RALPH EWING, Defendant.

Now on this 9th day of June A. D. 1908, came the plaintiff herein by J. H. Wendorff, City Attorney of Leavenworth City, Kansas, and also came defendant herein in his own proper person and by John T. O'Keefe, Esq. his attorney, and thereupon this cause came on in its regular order for trial before the Court, a jury having been heretofore waived, and the trial of this cause was proceeded with, and not being concluded on this day, the further hearing hereof is by the Court postponed until 10 o'clock A. M. tomorrow.

29 JUNE 13TH, 1908.

No. 3868.

THE CITY OF LEAVENWORTH, Plaintiff,
against
RALPH EWING, Defendant.

Now on this 13th day of June A. D. 1908, came the parties hereto as heretofore and by consent of both parties it is ordered by the

Court that the further argument of this case be and the same is hereby postponed until June 16th, 1908.

30 JUNE 16TH, 1908.

No. 3868.

THE CITY OF LEAVENWORTH, Plaintiff,
against
RALPH EWING, Defendant.

Now on this 16th day of June A. D. 1908 came the parties hereto as heretofore and thereupon the further trial of this cause was proceeded with, and the Court having heard the evidence adduced and the arguments of counsel thereon now takes this case under advisement.

31 JUNE 27TH, 1908.

No. 3868.

THE CITY OF LEAVENWORTH, Plaintiff,
against
RALPH EWING, Defendant.

Now on this 27th day of June A. D. 1908 came the plaintiff herein by J. H. Wendorff Esq. City Attorney, and attorney for the plaintiff herein, and also came the defendant herein in person and with John T. O'Keefe Esq. his attorney, and the Court having fully considered, the evidence heretofore introduced and the arguments of counsel thereon and being fully advised in the premises, now here finds the defendant guilty as charged in the complaint filed herein.

It Is Therefore now by the Court here considered, ordered and adjudged, that the defendant Ralph Ewing is guilty of conducting and carrying on, as agent of The United States Express Company, an express business within the City of Leavenworth without having paid for and obtaining a license therefore, as charged in the complaint filed in this action, and that the defendant pay a fine of $50.00 to the City of Leavenworth, as well as the costs of this action taxed at $— and that the defendant stand committed to jail until said fine and costs are paid, to which finding, ruling, decision and judgment the defendant duly objected and excepted, and thereupon the defendant filed his motion for a new trial, which motion was then and there taken up and considered and argued, and after due consideration was by the Court overruled, to which ruling and decision of the Court the defendant duly objected and excepted.

And thereupon for good cause shown the defendant is hereby given ninety days from this date in which to file his bill of exceptions herein.

And it is by the court further ordered that the defendant enter into a recognizance in the sum of $100.00 to stay the execution of judgment herein, and upon the execution of said bond with suffi-

cient surety to be approved by the clerk of this court, further execution of this judgment be stayed until final judgment be rendered herein.

Said bond was duly executed and approved. A copy follows:

32 STATE OF KANSAS,
Leavenworth County, ss:

In the District Court in and for said County.

Bond to Stay the Execution of Judgment Herein.

We, Ralph Ewing as principal and James M. Allen as surety, jointly and severally acknowledge to owe and be indebted to the City of Leavenworth in the sum of $100.00, if default be made in the condition following:

The condition of this recognizance is such that whereas on the 27th day of June, 1908, the said defendant, Ralph Ewing, in the above entitled court and cause was found guilty of a violation of ordinance 2367 of the City of Leavenworth, Kansas, and sentenced to pay a fine of $50.00 and costs taxed at $— and be committed to the jail of the City of Leavenworth, Kansas, until such fine and costs be paid: And wheras the said Ralph Ewing duly gave notice of appeal from the said judgment and it was ordered by the judge of said court that the execution of said judgment be stayed upon appellant, Ralph Ewing, giving bond in the sum of $100.00. Now therefore, if the said Ralph Ewing shall duly file his transcript and perfect and prosecute his appeal to final judgment and abide the final judgment herein then this recognizance be void; otherwise to be and remain in full force and effect.

Witness our hands this 27th day of June, 1908.

RALPH A. EWING.
JAMES M. ALLEN.

Taken and acknowledged before me this 27th day of June, 1908.

ROBERT G. McFARLAND,
Clerk of the District Court of Leavenworth County, Kansas.

33 STATE OF KANSAS,
Leavenworth County, ss:

In the District Court in and for said County.

THE CITY OF LEAVENWORTH, Plaintiff,
vs.
RALPH EWING, Defendant.

Notice of Appeal.

To the Clerk of the Above Named Court and the Attorney for the Plaintiff:

You and each of your are hereby notified that the defendant, Ralph Ewing, intends to appeal and does appeal from the decision

and judgment rendered him herein to the Supreme Court of the State of Kansas. Dated this 27th day of June, 1908.

JNO. T. O'KEEFE,
Attorney for Defendant.

I, the undersigned, Clerk of the District Court accept the service of the above entitled notice of appeal this 27th day of June, 1908.

R. G. McFARLAND,
Clerk of the District Court of Leavenworth County, Kansas.

I, the undersigned City Attorney of the City of Leavenworth and Attorney for plaintiff hereby accept for plaintiff service of the above notice of appeal this 27th day of June, 1908.

J. H. WENDORFF,
City Attorney of Leavenworth, Kans., and Attorney for Plaintiff.

Filed Aug. 26, 1908.

D. A. VALENTINE,
Clerk Supreme Court.

34 STATE OF KANSAS,
Leavenworth County, ss:

In the District Court in and for said County.

Demurrer.

Now comes defendant and demurs to the evidence of plaintiff herein for the reason that the same fails to show a public offense on the part of the defendant, and asks the court to dismiss this case and permit him to go hence with his costs.

JNO. T. O'KEEFE,
Attorney for Defendant.

35 STATE OF KANSAS,
Leavenworth County, ss:

In the District Court in and for said County.

Motion for New Trial.

Now comes defendant and moves the court to grant a new trial of this cause for the following reasons.

1. The court has admitted illegal testimony.
2. The decision and judgment of the court is contrary to law and evidence.

JNO T. O'KEEFE.
Attorney for Defendant.

36 STATE OF KANSAS,
Leavenworth County, ss:

In the District Court in and for said County.

Motion in Arrest of Judgment.

Now comes defendant and moves the court to arrest the judgment herein, and that no judgment be rendered on the finding of the court herein for the reason that the facts stated in the complaint and warrant herein do not constitute a public offense, and the finding of the judgment of the court herein is contrary to law and the evidence.

JNO. T. O'KEEFE.
Attorney for Defendant.

Filed Aug. 26, 1908.

D. A. VALENTINE,
Clerk Supreme Court.

37 Be it further remembered, that on this same day, the 27th day of June, 1908, the defendant presented the above and foregoing as a true, full and correct Bill of Exceptions herein; that he immediately serve- the same upon the plaintiff and by consent of both parties the same was immediately, all parties being present, presented to the clerk of the District Court as a true, full and correct Bill of Exceptions; And the court having duly examined the same, certified the same to be a true, full and correct Bill of Exceptions herein; and immediately ordered the Clerk of the District Court to attest the same with the name and seal of said court and file the same of record as provided by law, which is now accordingly done in open court.

[SEAL.] J. H. GILLPATRICK.
Judge of the District Court, Sitting in and for Leavenworth County, Kansas.

Attest:

R. G. McFARLAND,
Clerk District Court.

Filed Aug. 26, 1908.

D. A. VALENTINE,
Clerk Supreme Court.

38 STATE OF KANSAS,
Leavenworth County, ss:

In the District Court in and for said County.

I, Robert G. McFarland, Clerk of the District Court within and for the County of Leavenworth, State of Kansas, do hereby certify

that the above and foregoing is a full, true and correct Transcript of the record in the above entitled cause, as the same appears on file and of record in my office.

Witness my hand and the seal of said court hereunto affixed at my office in the City of Leavenworth this 27th day of June, 1908.

[SEAL.]

R. G. McFARLAND,
Clerk of the District Court of Leavenworth County, Kansas.

Filed Aug. 8, 1908. R. G. McFarland, Clerk District Court.
Filed Aug. 26, 1908. D. A. Valentine, Clerk Supreme Court.

39 Be it further remembered, that afterwards on the 1st. day of March A. D. 1909, the same being one of the regular judicial days of the January 1909 term of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record at page 293 of Journal "M-M", in the words and figures as follows, to-wit:

40 Journal "MM", Supreme Court, State of Kansas, March Session, January Term, 1909.

Page 293.

MONDAY, *March 1st*, 1909.

No. 16127.

THE CITY OF LEAVENWORTH, Appellee,
v.
RALPH EWING, Appellant.

This cause comes on to be heard on the notices of appeal and transcript of the record of the district court of Leavenworth county; and thereupon after oral argument by John T. O'Keefe for the appellant and by J. H. Wendorff for the appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

41 Be it further remembered, that afterwards on the 10th. day of April 1909, the same being one of the regular judicial days of the January 1909 Term of the Supreme Court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record at page 412 of Journal "MM" of said court in the words and figures as follows, to-wit:

42 Journal "MM", Supreme Court, State of Kansas, April Session, January Term, 1909.

Page 412.

SATURDAY, *April 10th*, 1909.

16127.

THE CITY OF LEAVENWORTH, Appellee,
v.
RALPH EWING, Appellant.

This cause comes on for decision; and thereupon, it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue.

43 Be it further remembered, that on the same day to-wit: the 10th. day of April, 1909, there was filed in the office of the clerk of the supreme court of the State of Kansas, the Syllabus and opinion of the court, in the above entitled case, which syllabus and opinion is in words and figures as follows, to-wit:

44 No. 16127.

THE CITY OF LEAVENWORTH
v.
RALPH A. EWING.

Error from Leavenworth County. Affirmed.

Syllabus by the Court.

JOHNSTON, *C. J.*

1. The legislature has authorized the officers of a city of the first class to impose a license tax on express companies and agencies conducting an express business within the state, that is the business of receiving packages from persons in the city and transmitting them to persons in other places within the state and of receiving and delivering packages transmitted from other places within the state to consignees in the city. Topeka v. Jones, 74 Kan. 164.

2. An occupation tax imposed on express companies under an ordinance wherein it expressly provided that it shall only apply to domestic business and never to interstate business is not a regulation of or a burden upon interstate commerce.

3. A tax may be imposed upon the business done within the state although the express company in carrying the packages from one point to another within the state passes for a short distance over the soil of another state.

4. It is not an objection to the tax that much the larger part of the business of such company is interstate. If a small but separable and definite part of the business is domestic the express company cannot escape payment of the state tax imposed on that part.

All the justices concurring.

A true copy.

Attest:

____ ____,

Clerk Supreme Court.

45 The opinion of the court was delivered by JOHNSTON, *C. J.*:

Ralph A. Ewing, agent of the United States Express Company at Leavenworth, was arrested for the violation of a city ordinance imposing a license tax on express companies and agencies. He was convicted upon the charge in the city court and upon appeal was again convicted in the district court. In this appeal he is complaining that the ordinance under which he was convicted was invalid and that the statute providing for a license tax on express companies and agencies is inapplicable and did not warrant the ordinance which was enacted. The statute under which the ordinance was drawn provides that the mayor and council may levy and collect a license tax upon and regulate the callings and occupations carried on and operated within the limits of the city "including express companies and agencies." The ordinance provides that no person, firm or corporation through his principal or agent shall carry on or conduct any business, occupation or calling in the city of Leavenworth without taking out a license and paying the license tax prescribed in the ordinance. It then provides:

"The sum of $50.00 per year on the business and occupation of express company, corporation or agency, in receiving packages in the city from persons in the city and transmitting the same by express from this city within the state to persons and places within the state and receiving in this city packages by express transmitted within the state from persons and places in this state to persons within this city, excepting the receipt transmission and delivery of any such packages to and from any department, agency or agent of the United States, and excepting the receipt, transmission and delivery of any such packages which are interstate commerce. The business and occupation of receiving, transmitting and delivering of the packages herein excepted is not taxed hereby."

The violation of any of the provisions of the ordinance is declared to be a misdemeanor for which a fine may be imposed of not less than the amount of the license required to be paid nor more than double the amount thereof. The contention that the statute authorizing the tax on occupations conducted within the city does

46 not include the express business of carrying packages from other cities and places of the state into Leavenworth or of collecting packages in Leavenworth and carrying them to places within the state but outside the city has been negatively answered in Topeka v. Jones, 74 Kan. 164. It is contended, however, that the ordinance imposes a tax and burden upon interstate commerce and is

therefore invalid. It will be observed that neither the statute nor the ordinance proposes to lay a tax upon interstate business. On the other hand it is made clear by the terms of the ordinance that interstate business as well as that done for the United States is expressly excepted from its operation. It is conceded that persons and corporations engaged in interstate business may be subjected to the payment of taxes properly levied by the state upon their property within its borders and also on business wholly conducted within the state and it is likewise conceded that no state has the power to lay a direct tax or burden upon interstate commerce. The Supreme Court of the United States has held in a great number of cases that a tax levied directly upon interstate business alone or upon such business where it is carried on in connection with local business and also a requirement that persons or corporations shall take out a license and pay a tax before they can conduct an interstate or local business is a burden on commerce between the states and a regulation which belongs exclusively to Congress. The following may be cited as a type of many other cases.

Crutcher v. Kentucky, 141 U. S. 47.
Leloup v. Port of Mobile, 127 U. S. 640.
Norfolk &c. Railroad Co. v. Penn. 136 U. S. 114.
See also The State v. Telegraph Co., 75 Kan. 609, and cases therein cited.

It is equally well settled that persons or companies carrying on a domestic business in connection with interstate business may be subjected to the payment of a state tax imposed on purely domestic business. In the Crutcher case after holding that a statute which made the obtaining of a license a prerequisite to the doing of interstate business was invalid it was stated that "taxes or license
47 fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." The direct question of the right to impose a license tax upon local business carried on by express companies doing both local and interstate business was determined in Osborne v. Florida, 164 U. S. 650. It was there held that "so long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate there is no interference with that commerce by the state statute." It is also said that where the "law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce and therefore void," but it was also held that if an express company can conduct its interstate business without paying any attention to the statute and is not required to take out a license or pay a tax before doing that kind of business the statute is valid. See also

Western Union Telegraph Co. v. James, 162 U. S. 650.
Ratterman v. Western Union Telegraph Co., 127 U. S. 411.
Maine v. Grand Trunk Ry. Co., 142 U. S. 217.
Pacific Express Company v. Seibert, 142 U. S. 339.

Lehigh Valley Railroad v. Pennsylvania, 145 U. S. 192.
Pullman Co. v. Adams, 189 U. S. 420.
Allen v. Pullman Company, 191 U. S. 171.
Pennsylvania R. R. Co. v. Knight, 192 U. S. 21.

The declared purpose of the statute as well as its operation and effect is to lay a tax on business which is purely domestic and of the good faith of the legislation there can be no doubt. It is contended, however, that the attitude of the United States Express Company is exceptional and as to its local business even the tax is an illegal exaction. It appears that the company uses a branch of the Chicago, Rock Island & Pacific Railway in transporting packages to and from the city of Leavenworth which is the terminus of that branch. The railroad comes into Leavenworth from Missouri and all express business of the company, either local or interstate, necessarily passes through Missouri. About ninety per cent of its business is
48 the carrying of articles and packages to people in places other than Kansas and the remaining ten per cent of its business is done between Leavenworth and other points in Kansas, but even this portion of the carriage is for a short distance through Missouri. The license tax was upon so much of the company's business as was carried on in Kansas. It had an office and local conveyances in Leavenworth for the collection of packages in that city and it made contracts for transporting these packages to places within the state. Likewise it collected packages in other parts of the state and carried them into Leavenworth where they were delivered to the consignees. Does the fact that in carrying these packages between points in Kansas they pass over the soil of another state for a short distance make the tax on that business invalid? There is no claim that there is a mileage rate on the business or that the charge for the carriage by this circuitous route is greater than is made by express companies carrying packages from Leavenworth to Atchison and other Kansas points by direct and shorter routes wholly within the state. This part of the business, it would seem, is intercourse between people in Kansas and between places in Kansas and cannot for purposes of taxation be regarded as commerce between states. Pennsylvania imposed a state tax on the business done by railroad companies within that state. In transporting property from one point in Pennsylvania to another point in the same state the property was carried into and through a part of New Jersey. The amount of the tax, however, was determined in respect to the proportion of the transportation within the state. As against the tax it was contended that the deviation of the road through New Jersey gave the business an interstate character and made the tax a burden on interstate commerce. It was said that as the point of departure and the point of arrival was within the state the intercourse was between these points and not between any other points. It was remarked that "The question does not arise as to the power of any other state than the state of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsyl-
49 vania of the operations of this or any other company elsewhere, but it is simply whether in the carriage of freight and

packages between two points in one state the mere passage over the soil of another state renders that business foreign which is domestic. We do not think such a view can be reasonably entertained and are of the opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk." It was recognized that there could be no direct regulation of the transportation which has passed beyond the jurisdiction of the state but it was held that the state might tax the business done in the course of a continuous carriage from one point to another in the state although in accomplishing it a part of another state was incidentally traversed. Lehigh Valley Railroad v. Pennsylvania, supra. The rule there adopted applies here. In this case there is no question of rate on transportation but only a tax laid on that part of the company's business done within the limits of the state. Attention is called to Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, as an authority against the imposition of the tax. It was there held that a state could not fix or enforce rates between points within the state when the transportation was without the state. It was said that the regulation of transportation was indivisible; that when a rate was established it must be established as a whole and adopting this unit rule it was held the action of the state was invalid. In that case the Lehigh Valley Railroad case was referred to and its rule was sustained upon the ground that it was a case of taxation and could be readily distinguished from an attempt by a state to regulate transportation while outside its borders. The case of Maine v. Grand Trunk Ry. Co., supra, was also cited as an instance in which a tax was determined in respect to receipts for the proportion of the transportation within the state and that such tax had been sustained although it was admitted to be interstate. As tending to sustain the same view see also

Cincinnati Packet Co. v. Bay, 200 U. S. 179.

United States v. Lehigh Val. R. Co., 115 Fed. 373.

Railroad Commissioners v. Western Union Tel. Co., 113 N. C. 213.

Campbell v. Chicago, Milwaukee & St. Paul Ry. Co., 86 Ia. 587.

50 The result of the authorities is that a rate on a continuous carriage from point to point within the state is to be regarded as a unit and when it is applied to a shipment which passes through more than one state it takes on an interstate character and is beyond the regulation of the state, but a different rule obtains in the matter of taxation. The state may properly tax the property located within its borders of a corporation doing an interstate business and may also tax that part of the business of such corporation which is done within the state. The extent of the state business is of little consequence. The domestic business may be inconsiderable and if a small but definite part of the business is domestic the company transacting it cannot escape paying the state tax on that part. The State v. Telegraph Co., supra; Kehrer v. Stewart, 197 U. S. 60. The appellant argues that as the tangible property of the express company is sub-

ject to taxation it is unjust to impose the additional tax on its business but all know that express companies have but little tangible property subject to taxation and the practical methods by which such companies can be afforded an opportunity to contribute their just share of the public burdens and pay for the protection which the public gives is through excise taxes or license taxes on their business. Pacific Express Co. v. Seibert, 142 U. S. 339.

The statute and ordinance being valid and the tax legal the judgment of the district court must be affirmed.

All the justices concurring.

A true copy.

Attest:

____ ____,

Clerk Supreme Court.

51 Be it further remembered, that afterwards on the 1st day of May 1909, there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition for a rehearing of the above case, which petition for a rehearing is in the words and figures as follows, to-wit:

52 In the Supreme Court of the State of Kansas.

THE CITY OF LEAVENWORTH, Appellee,

vs.

RALPH A. EWING, Appellant.

Appellant's Petition for a Rehearing.

Ralph A. Ewing, appellant, herein, petitions the court for a rehearing of this case for the following reasons:

1. Appellant contended both in his brief (Pages 34, 35, 36, etc.) and in his argument before the Court that any power that might have been delegated to the city to levy the license tax in question was repealed by Chapter 202 Laws of 1907. This question in the case was evidently oversighted in the determination and decision of the Court.

As said by this Court "The statute under which the ordinance was drawn provides that the mayor and council may levy and collect a license tax upon and regulate callings and occupations carried on and operated within the limits of the city 'including express companies and agencies.' The ordinance provides that no person, firm or corporation through his principal or agent shall carry on or conduct any business, occupation or calling in the city of Leavenworth without taking out a license and paying the license tax prescribed in the ordinance. It then provides:

"The sum of $50.00 per year on the business and occupation of express company, corporation or agency, in receiving packages in the city from persons in the city and transmitting the same by express from this city within the state to persons and places within the state and receiving in this city packages by express transmitted

within the state from persons and places in this state to persons within this city, excepting the receipt, transmission and delivery of any such package to and from any department agency or agent of the United States, and excepting the receipt, transmission and delivery of any such packages which are interstate commerce. The business and occupation of receiving, transmitting and delivering of the packages herein excepted is not taxed hereby."

"The violation of any of the provisions of the ordinance is declared to be a misdemeanor for which a fine may be imposed
53 of not less than double the amount thereof. The contention that the statute authorizing the tax on occupations conducted within the city does not include the express business of carrying packages from other cities and places of the state into Leavenworth or of collecting packages in Leavenworth and carrying them to places within the state but outside the city has been negatively answered in Topeka v. Jones, 74 Kan. 164." (Opinion P. 1.)

This court plainly construes this statute to authorize the levy of a tax on express business for carrying packages from other cities and places of the state into Leavenworth and of collecting packages in Leavenworth and carrying them to places within the state but outside the city.

The ordinance itself plainly reads that the tax is levied on the business of receiving packages in the city from persons in the city and transmitting the same by express from the city to persons and places within the state and receiving in the city packages by express transmitted within the state from persons and places in the state to persons and places within the city.

In other words it is a tax on one end of the business of carrying packages between points in the state.

On this point appellant claimed, both in brief and argument, that the legislature of the state of Kansas when in March 1907 it passed "Senate Bill No. 134" "An act regulating express companies and providing for an excise tax on the same and for the collection thereof (Chapter 202 Laws of 1907)" repealed any delegation of power it might have before given to the various cities to tax the express business of carrying packages within the state.

Sub. 6 of Sec. 2 of this act covers. "The entire receipts (including all sums earned or charged, whether actually received or not) for business done within this state or each agent of such company doing business in the state including its proportion of gross receipts for business done by such company within this state in connection with other companies; also the total amount of such receipts for business done within this state.

Sub. 8. "The entire receipts of the company for business done within the state.

Sec. 6 authorizes the state officers "to charge and collect
54 from each express company doing business in the state of Kansas a sum, in the nature of an excise tax, to be computed by taking one and one half per cent on the gross receipts of such company for business done within the state of Kansas.

This act plainly attempts to cover every package handled by the

express companies from point to point and from city to city within the state of Kansas from the moment it first reaches the company's hands until it is delivered to the consignee.

It provides for the levy of a tax on the whole business. It covers not only both ends of the business but the carriage between points. It levies for the use of the people of the state as a whole a tax on each and every package from the moment received to the moment it leaves the company's hands.

Sec. 7 provides that "all acts or parts of acts in conflict herewith are hereby repealed.

Sec. 6 provides "nothing in this act shall exempt or release express companies from the assessment and taxation of their tangible property in the manner authorized and provided by law, all taxes collected shall be paid into the state treasury, and be credited to the general revenue fund."

The state here taxes the entire handling of the business including the ends in the cities and the transportation between.

The state here plainly has attempted to adopt a new method of taxing express business. This act plainly repeals any power before given to any subdivision of the state to tax this business or any end of it. When the state says: "Nothing in this act shall exempt or release express companies from the assessment and taxation of their tangible property in the manner authorized and provided by law" and repeals all acts or parts of acts in conflict with the other provisions of the act, it plainly says that many law heretofore existing taxing this business or any part of it, is repealed.

On March 10, 1909, the legislature passed "Senate Bill No. 520."

"An act regulating express companies, and providing for an excise tax on the same, and for the collection thereof and repealing "Chapter 202 Laws of 1907", and all acts and parts of acts in conflict with this act."

This act is practically a repetition of Chapter 202 Laws of 1907 "excepting the one and one-half per cent to be levied is raised to four per cent. It covers the same business as the law of 1907. The four per cent is levied on the entire receipts (including all sums earned or charged, whether actually received or not) for business done within this state of each agent of such company doing business in the state, giving the name of the office and agent and the amount received by him, including its proportion of gross receipts for business done by such company within the state in connection with such companies; also the total amount of such receipts for business done within the state." (Sub. 6.)

Sub. 8, Sec. 2 covers, "The entire receipts of the company for business done within the state of Kansas."

Sec. 6 provides "Provided, nothing contained in this act shall exempt or release express companies from the assessment and taxation of their tangible property in the manner authorized and provided by law.

SEC. 7. Chapter 202 Laws 1907, and all acts and parts of acts in conflict herewith, are hereby repealed."

II.

The record shows (abstract of Record pages 7 and 8) Ninety per cent of the business of the Leavenworth office is foreign business." "About ten per cent is business between cities in Kansas." Page 8 "and for that business alone the business or office could not be maintained with profit."

It is plain that the imposition of a license tax upon this small portion of the business would be unreasonable and oppressive and the city should not be permitted to levy this tax. If it has the power to levy $50.00 it may be said it would have the power to levy $200.00 or $300.00 on that end of the business within the city alone. Other cities may do the same thing. There would be no regularity in this way of doing business and it may have been for this reason that the legislature saw fit to levy a per cent tax upon the entire business itself and as we contend repealed any authority that might have been authorit-ively given to the various cities who tax this business.

56 The State of Kansas ex rel., &c., v. Jacobs Studt et al., 31 Ks., 245:

"Where a later statute covers the entire subject-matter of a prior act, and embraces new and different provisions plainly indicating that it was intended as a substitute therefor, it will, without any express declaration to that effect, operate as a repeal of such former act, and held, that under this rule, chapter 68 of the laws of 1872, as amended by chapter 39 Laws of 1874, repealed chapter 33, Laws of 1870, as amended by chapter 48, Laws of 1871."

"The simple question therefore is, whether the earlier statutes are superseded by the later. It is not pretended that the former are in terms repealed: but the contention is, that the latter are in the nature of a substitute for, and therefor- superseded the former. It is familiar law that a later statute will operate as a repeal of a former, though it contains no express repeal, and even though its provisions are not absolutely repugnant to those of the former; whenever it is obvious that the one was intended as a substitute for the other. The rule is thus stated by Mr. Justice Field, in the case of the United States v. Tynen 11 Wall. 92:

"Even where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

See also the following cases: Davies v. Fairbairn 3 How. 636; Bartlett v. King, 12 Mass. 537; Commonwealth v. Cooley, 10 Pick. 36; Pierpont v. Crouch 10 Cal. 315; Sacramento v. Bird 15 id. 294; Swann v. Buck, 40 Miss. 269; Norris v. Crocker, 13 How. 429; Sedgwick on Stat. and Const. Law 124."

The State of Kansas vs. J. B. Showers, 34 Ks., 269:

Where a repealing statute contains a special saving clause, the general saving statute contained in §1, chapter 104 of the General Statutes (Comp. Laws of 1879, ch. 104, §1) will not apply, and no rights or remedies will be saved except such as are saved by the special sav-

ing clause. (Willetts v. Jeffries, 5 Ks. 473; Gilleland v. Schuyler 9 Ks. 569; State v. Boyle 10 Ks. 113, 116, 117; State v. Crawford 11 Ks. 32; Jennis v. Cutler 12 Ks. 500, 511, 512; In re Petty 22 Ks. 477; State v. Studt 31 Ks. 245, 246.)

The question as to what should be repealed and what saved was before the legislature. It expressly saved some things; therefore it must be inferred that it intended to save no other. Expressio unius est exclusio alterius. The legislature evidently intended that that special saving clause which it enacted in §19 of the act of 1885 should take the place of all others, so far as prosecutions under original §7 were concerned; and that in cases where the special saving statute should have no operation.

"It is a well settled rule of construction, that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it." (Felt v. Felt 19 Wis. 196.)

It is familiar law that a later statute will operate as a repeal of a former, though it contains no express repeal, and even though its provisions are not absolutely repugnant to those of the former, whenever it is obvious that the one was intended as a substitute for the other." (The State v. Studt 31 Ks. 245, 246 and cases there cited. See also Rogers v. Watrous 8 Tex. 62; Kane v. The State, 20 id. 364; Tunstall v. Wormley, 54 id. 476, 480.)

The Chicago, Kansas & Nebraska Railway Company v. The City of Manhattan et al., 45 Ks., 419:

P. 422. We need not decide this question at this time.
57 Chapter 67, Laws of 1886, is the latest statute, and is complete in itself. It covers the entire subject-matter therein referred to. It contains a limitation upon the amount of bonds to be issued to any railroad company. This is as follows

Beadle v. K. C., Ft. S. & M. Ry. Co., 51 Ks., 250:

The general rule is, that a statute covering the whole subject-matter of a former one adding offenses and varying the procedure, operates not cumulatively, but by way of substitution and therefore impliedly repeals it. (United States v. Claflin 97 U. S. 546; Young v. Railroad Co. 33 Mo. App. 514; Crosby v. Bennett, 48 Mass. 19; Smith v. The State, 14 Mo. 115; Thurston v. Prentiss 1 Manning 201; Commonwealth v. Cooley, 10 Pick. 37.)

The State of Kansas v. C. H. Menke, 56 Ks., 77:

P. 80. The act appears to be a complete revision of the then existing law relating to banking, and added thereto are many features entirely new. Instead of expressly repealing the sections revised, there was inserted in the act a general clause repealing all the acts and parts of acts inconsistent therewith. Although chapter 48*a* of the Laws of 1879 was not specifically repealed, section 16 of the later act is so clearly a revision of the former that it operates to abrogate the former one. A comparison of the two sections leaves no doubt that

the later covers the whole subject of the former one, and as the later act omits some parts of the first, changes others, and embraces new provisions, thereby increasing the penalty, it is obvious that it was intended as a substitute for the first act, and under the rule frequently declared it will operate as a repeal of that act. (The State ex rel. v. Studt 31 Ks. 245; The State v. Showers 34 Id. 269; C. K. & N. Ry. Co. v. City of Manhattan 45 id. 419; Beadle v. K. C. Ft. S. & M. Ry. Co. 51 id. 248.)

D. A. Mitchell v. The State of Kansas, 61 Ks., 779:

The office of Police Judge in cities of the first class has been appointive since the enactment of chapter 123 of the laws of 1895. (Gen. Stat. 1897, ch. 32, §§24, 25; Gen. Stat. 1889, §808.)

We may apply also, the settled rule that when a later statute covers the subject-matter of a prior one and embraces new and different provisions, indicating that it was a substitute for a prior act, it will operate as a repeal of the former without any express declaration to that effect. (The State v. Studt 31 Kan. 245, 1 Pac. 635; Lawson v. Comm'rs of Reno Co. 47 id. 271, 47 Pac. 271; The State v. Menke 56 id. 77, 42 Pac. 350; Begwell v. The Town of Lawrenceville, 94 Ga. 654, 21 S. E. 903.)

The State v. Estep, 66 Ks., 419:

It is clear that the first section of chapter 232 Laws of 1901, set out in the statement, repeals that part of section 4 of the law of 1887 which makes it a criminal act to keep and maintain a nuisance. This is apparent from the fact that the two statutes are directed against criminal acts not widely different, with an increase of punishment in the later law.

The law of 1887 fixes the punishment at a fine of not less than $100 nor more than $500 and imprisonment in the county jail not less than thirty nor more than ninety days. In the law of 1901 the fine which may be imposed is the same, but the imprisonment provided is "not less than thirty days nor more than six months."

58 "In State v. Menke 56 Kan. 77, 80, 42 Pac. 350, it was held that a law passed in 1891, making it an offense for officers of a bank knowingly to receive deposits when the bank was insolvent, repealed a former law covering the same subject. The Court said: "A comparison of the two section- leaves no doubt that the later covers the whole subject of the former one, and as the later act omits some parts of the first, changes others, and embraces new provisions, thereby increasing the penalty, it is obvious that it was intended as a substitute for the first act, and under the rule frequently declared it will operate as a repeal of that act." (See also The State v. Studt 31 Kan. 245, 1 Pac. 635.)

In United States v. Claflin 97 U. S. 546, 552, 24 L. Ed. 1082, 1085, the case of Norris v. Crocker et al., 13 How. (U. S.) 429, 14 L. Ed. 210, is quoted from approvingly, as follows:

"As a general rule, it is not open to controversy, that, where a new statute covers the whole subject-matter of an old one, adds offences, and prescribes different penalties for those enumerated in the old law,

the former is repealed by implication, as the provisions of both cannot stand together."

The City of Belleville v. Seth G. Wells, 74 Kan., 823:

3. The amount of bonds which cities of the first, second and third classes are authorized to issue, under chapter 101 of the Laws of 1905, for the purposes therein mentioned, is not controlled by any limitation of previous legislative acts. The act of 1905 is the latest expression of legislative will upon the subject, and repeals the provisions of all other acts in conflict with it.

P. 829. It will be observed that, as was said in C. K. & N. Ry. Co. v. City of Manhattan, 45 Kan. 419, 25 Pac. 879, this "is the latest statute and is complete in itself." (Page 422. See, also the State v. Studt 31 Kan. 245, 1 Pac. 635.) Moreover, section 5 repeals all acts and parts of acts in conflict with the provisions of the act in question. It does not purport to be an amendment to any previous act, but is an independent measure. All bonds issued under its provisions are limited in amount by the provisions of section 4. The limitation in other statutes, therefore, do not control the amount of bonds authorized to be issued under this act. The plain words of the statute speak for themselves, and the courts are bound by them. The writ is allowed.

59 The statutes of 1907 and of March 10, 1909, cover the entire subject-matter of levying a tax on the business of the express company. These statutes cover the whole subject-matter and impliedly repeal any previous statutes or delegation of power covering part of this subject. These statutes are complete in themselves and indicate plainly how the business of the express company should be taxed. As indicative of this fact both the statute of 1907 and the statute of 1909 provide that nothing in the act shall exempt or release express companies from the assessment and taxation of their tangible property in the manner authorized and provided by law.

Express companies are taxed on their business or earnings, and taxed on their tangible property. The law provides that the tangible property should continue to be taxed as before, but the business of the company should bear the four per cent tax on the earnings. We contend that these later acts plainly repeal any power given to any subdivision of the state to tax any part of this business. We ask for a rehearing.

Respectfully submitted.

JNO. T. O'KEEFE,
Attorney for Appellant.

Endorsed: No. 16127—City of Leavenworth v. Ewing. Motion for a rehearing. Filed May 1st, 1909. D. A. Valentine, Clerk Supreme Court.

60 Be it further remembered, that afterwards on the 11th day of May 1909, the same being one of the regular judicial days of the January Term 1909 of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka,

the following proceeding was had and remains of record at page 491 of Journal "MM" of said court in the words and figures, as follows, to-wit:

61 Journal "M-M" Supreme Court, State of Kansas, May Session, January Term, 1909.

Page 491.

TUESDAY, *May 11th*, 1909.

No. 16127.

CITY OF LEAVENWORTH, Appellee.
v.
RALPH EWING, Appellant.

Now comes on for decision the petition for a re-hearing of this cause; and thereupon it is ordered that said petition for a re-hearing be denied.

62 In the Supreme Court of the State of Kansas.

No. 16127.

THE CITY OF LEAVENWORTH, Appellee,
vs.
RALPH EWING, Appellant.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas do hereby certify that the above and foregoing is a true, full and complete transcript of the record and proceedings in the above entitled case and also of the opinion of the court rendered therein, as the same remains of record and now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 14 day of May 1910.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE.
Clerk Supreme Court of Kansas.

62½ Here follow, the petition for the writ of error, the assignments of error and the allowance of the writ of error and fixing of supersedeas bond, the writ of error and the allowance thereof, a copy of the bond for appeal and supersedeas and the approval thereof, the citation and the proof of service thereof on the appellee.

63 In the Supreme Court of Kansas.

RALPH EWING, Appellant,
vs.
THE CITY OF LEAVENWORTH, Appellee.

Appeal from Leavenworth County, Kansas.

Petition for Writ of Error.

Ralph A. Ewing, a citizen of the United States, and appellant in the above cause, wherein was drawn in question the validity of Statutes of the State of Kansas and the validity of a certain Ordinance of the City of Leavenworth No. 2367, and the validity or unconstitutionality of the judgment rendered upon the evidence therein and wherein was drawn in question the consideration of different clauses of the constitution of the United States, and wherein was drawn in question the consideration of the right of the State or City to tax inter-state commerce, and wherein was drawn in question the consideration of other clauses of the Constitution of the United States directly involved in the hearing and final determination of the cases as shown by the record herein and the decision was against the rights, privileges and exemptions specially set up and claimed under the constitution of the United States, and the different clauses thereof, feeling himself aggrieved by the decision and judgment entered in the above entitled court and cause on the 10th day of April, 1908, wherein this court refused to reverse and vacate the judgment and proceeding by it reviewed, on appeal from the District Court of Leavenworth County, Kansas, upon the ground that the laws of the State of Kansas and the Ordinance of the City of Leavenworth and the evidence thereunder were repugnant to the constitution of the United States and the evidence plainly show- that the business carried on by the United States Express Company, for which appellant was agent, was plainly and wholly an inter-state business and whereas, the Supreme Court of the State of Kansas in its judgment held that such business was not an inter-state business and was taxable as shown by the opinion of said court, a copy of which is hereto attached, herewith filed and made part hereof, in which the Supreme Court of the State of Kansas held the said Ordinance constitutional and affirmed the said judgment and proceedings herein, considering the evidence showing as admitted, that
64 Leavenworth did not receive or send out any express business excepting what was carried through other states; and further, because this court denied appellant a re-hearing in said cause on the 11th day of May 1909. Appellant Ralph A. Ewing comes now by Jno. T. O'Keefe, Frank H. Platt, Morgan J. O'Brien, Albert B. Boardman and Martin W. Littleton and prays an order allowing appellant to prosecute a writ of error to the Honorable Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, there being in such judg-

ment and proceedings certain errors committed to the prejudice of appellant as will more fully and in detail appear from the assignment of errors, filed herein. Appellant also prays that an order be made fixing the bail and security appellant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceeding in this court be suspended and staid until the determination of said writ of error by the Supreme Court of the United States and your petitioner will ever pray.

JNO. T. O'KEEFE,
FRANK H. PLATT,
MORGAN J. O'BRIEN,
ALBERT B. BOARDMAN,
MARTIN W. LITTLETON,
Attorneys for Appellant and Petitioner.

65 [Endorsed:] No. 16127. Ralph A. Ewing vs. City of Leavenworth. Petition for Writ of Error. Filed May 5, 1910. D. A. Valentine, Clerk Supreme Court. Jno. T. O'Keefe, Attorney at Law, Leavenworth, Kan.

66 In the Supreme Court of the United States, —— Term, in the Year of Our Lord Nineteen Hundred Ten.

RALPH A. EWING, Plaintiff in Error,
vs.
THE CITY OF LEAVENWORTH, Defendant in Error.

Assignment of Errors.

Comes now Ralph A. Ewing, plaintiff in error, who was defendant in the case below and alleges and says to the Court that in the record and proceedings had in the above cause there is manifest error to his prejudice in the following particulars, to-wit:

1. That the Supreme Court of the State of Kansas erred in affirming the judgment against plaintiff in error and the proceedings of the District Court of Leavenworth County, Kansas, shown by the record to have been presented to it for review in said cause.

2. That the Supreme Court of Kansas erred in affirming the order and decision of the District Court of Leavenworth County, Kansas, over-ruling the motion of plaintiff in error to quash the information filed against him in said cause and erred in holding as expressed and shown in the 80 Ks. 58:

1. "The legislature has authorized the officers of a city of the first class to impose a license-tax on express companies and agencies conducting an express business within the state—that is, the business of receiving packages from persons in the city and transmitting them to persons in other places within the state, and of receiving and delivering packages transmitted from other places within the state to consignees in the city." (Topeka vs. Jones, 74 Kan. 164.)

2. "An occupation tax imposed on express companies, under an

ordinance wherein it is expressly provided that it shall only apply to domestic business and never to interstate business, is not a regulation of or a burden upon interstate commerce."

3. "A tax may be imposed upon the business done within the state although the express company in carrying the packages from one point to another within the state passes for a short distance over the soil of another state.

4. It is not an objection to the tax that much the larger part of the business of such company is interstate. If a small but separable and definite part of the business is domestic the express company can not escape payment of the state tax imposed on that part."

3. That the Supreme Court of the State of Kansas erred in its decision holding that under the facts the agent of the United States Express Company, Ralph A. Ewing, was liable to fine and imprisonment, being violative of constitutional rights.

4. Under the evidence in this case the Supreme Court of
67 the State of Kansas erred in holding Ralph A. Ewing guilty since Ralph A. Ewing was simply the agent of the express company, the express company simply handling express business engaged in interstate commerce and any fine or imprisonment imposed upon him was and necessarily must be a burden upon interstate commerce.

5. The Supreme Court of Kansas erred in denying and refusing to plaintiff in error a re-hearing upon his petition for a re-hearing as shown in the record upon the 11th day of May, 1909.

6. Because the imposition of a tax or the imprisonment of Agent Ralph A. Ewing would be in violation of all of the different clauses of the United States Constitution, covering this question.

Wherefore Ralph A. Ewing, plaintiff in error, prays that the judgment, order and decision of the said Supreme Court of Kansas be reversed, and that such directions be given that plaintiff in error will be restored to all the things which he has lost by reason of the said judgment and decision sought herein to be reversed, and for the costs of this proceeding.

JNO. T. O'KEEFE.
FRANK H. PLATT.
MORGAN J. O'BRIEN.
ALBERT B. BOARDMAN.
MARTIN W. LITTLETON.
Attorneys for Plaintiff in Error.

STATE OF KANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Ralph A. Ewing to the State of Kansas in the sum of $1000.00 said bond when approved to act as a supersedeas.

W. A. JOHNSTON,
Chief Justice.

68 [Endorsed:] No. 16127. Ralph A. Ewing Plaintiff vs. City of Leavenworth Defendant. Assignment of Errors. Filed May 5, 1910. D. A. Valentine, Clerk Supreme Court. Jno. T. O'Keefe, Attorney at Law, Leavenworth, Kan.

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of the State of Kansas:

Because in the records and proceedings, as also the rendition of a judgment in a plea which is in the said Supreme Court of Kansas before you, at the April and June sitting of the Jan. term 1909 thereof, between the City of Leavenworth as plaintiff against Ralph A. Ewing defendant, a manifest error has happened to the great damage of the said defendant Ralph A. Ewing, as by his complaint appears.

We being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the United States Supreme Court together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C. and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this May 4th, 1910.

Done in the City of Topeka with the seal of the Circuit Court of the United States for the District of Kansas attached.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk Circuit Court of the United States, District of Kansas.

Allowed.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

70 [Endorsed:] No. 16127. Ralph A. Ewing vs. City of Leavenworth. Writ of Error. Filed May 5, 1910. D. A. Valentine, Clerk Supreme Court. Jno. T. O'Keefe, attorney at law, Leavenworth, Kan.

71 Supreme Court of the United States.

RALPH A. EWING, Plaintiff in Error,
vs.
THE CITY OF LEAVENWORTH, KANSAS, Defendant in Error.

Bond.

Know all men by these presents, That we, Ralph A. Ewing as principal and The United States Fidelity & Guaranty Company as

sureties, are held and firmly bound unto the City of Leavenworth, Kansas, in the sum of One Thousand ($1,000) Dollars to be paid to the said city, to which payment, well and truly to be made, we *bound* ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 4th day of May, 1910.

Whereas the above-named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Kansas,

Now, therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

RALPH A. EWING.
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By —— ——, *Att'y in Fact.*
By FRANK S. DAVIS, *Att'y in Fact.*

72 STATE OF KANSAS,
Shawnee County, ss:

—— ——, —— —— being each duly sworn on oath depose and say: We are each of lawful age and are citizens of the State of Kansas, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of One Thousand Dollars over and above all debts, liabilities and exemptions.

—— ——.
—— ——.

Subscribed and sworn to before me this 4th day of May, 1910.

—— ——.

The above bond is approved.

W. A. JOHNSTON,
Chief Justice of the State of Kansas.

Endorsed: No. 16127. Ralph A. Ewing vs. City of Leavenworth. Bond. Filed May 5, 1910. D. A. Valentine, Clerk Supreme Court. Jno. T. O'Keefe, Attorney at Law, Leavenworth, Kan.

73 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Leavenworth, in the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Kansas, wherein Ralph A. Ewing is plaintiff in error and you are

defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Kansas this 4th day of May, 1910.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Attest.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Marshal's Return.

Received this writ at Topeka, Kansas, May 5, 1910, and served the same upon the City of Leavenworth in the State of Kansas, by delivering to Omar M. Abernathy, mayor, personally, a true and certified copy of this writ, with all endorsements thereon, at Leavenworth, Kansas, on the 6th day of May, 1910.

Fees $5.72.

WILLIAM H. MACKEY, JR.,
U. S. Marshal, Dist. of Kansas,
By U. E. NEED, *Deputy.*

74 LEAVENWORTH, KANSAS, *May* —, 1910.

I, the attorney of record and in fact for the defendant in error in the above entitled case and also city attorney for the City of Leavenworth, State of Kansas, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

——— ———,
Attorney for the City of Leavenworth and City Attorney for the City of Leavenworth, State of Kansas.

75 [Endorsed:] No. 16127. Ralph A. Ewing, Plaintiff, vs. City of Leavenworth, Defendant. Citation. Issued May 4th, 1910. Filed May 9, 1910. D. A. Valentine, Clerk Supreme Court. Jno. T. O'Keefe, attorney at law, Leavenworth, Kan. May 6, 1910.

76 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, Clerk of the supreme court of the state of Kansas, do hereby certify that there was lodged with me as such clerk, on the 5th day of May, 1910, — the matter of the City of Leavenworth, Appellee vs. Ralph Ewing, appellant,

1st. The original bond of which a copy is herein set forth.

2nd. Two copies of the writ of error, as herein set forth,—one for the defendant and one to file in my office.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 14 day of May, 1910.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

77 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court of Kansas, in the city of Topeka, this 14 day of May, 1910.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 22,208. Kansas Supreme Court. Term No. 309. Ralph A. Ewing, plaintiff in error, vs. The City of Leavenworth. Filed June 1st, 1910. File No. 22,208.

[redacted]

IN THE

Supreme Court of the United States

October Term, 1917

RALPH A. EVANS,

Plaintiff in Error,

against

THE CITY OF LEXINGTON,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KENTUCKY.

BRIEF FOR THE PLAINTIFF IN ERROR.

[redacted]

IN THE

Supreme Court of the United States.

October Term, 1911.

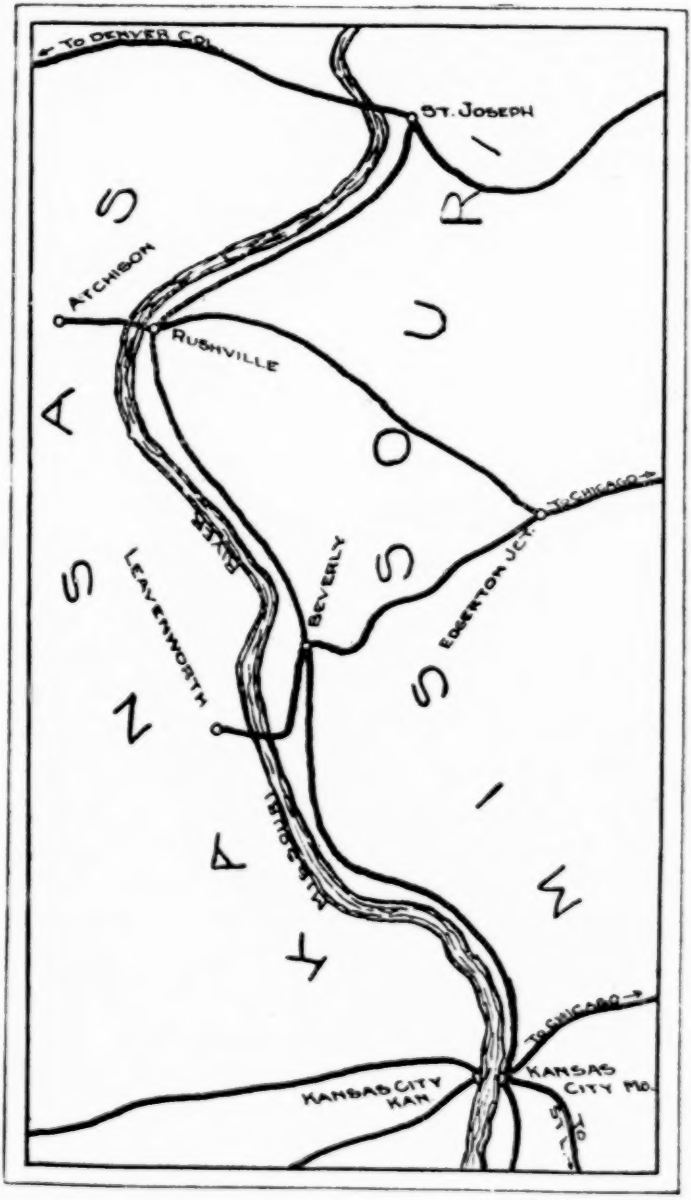
RALPH A. EWING, Plaintiff in Error, against THE CITY OF LEAVENWORTH.	No. 309.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR THE PLAINTIFF IN ERROR.

Plaintiff in Error is the United States Express Company's agent at Leavenworth, Kansas. He was convicted for doing business without a license. This case involves the validity of the judgment of conviction.

The Express Company receives, at Leavenworth, express packages and forwards them by railroad to other cities and towns, and delivers packages which it has forwarded to Leavenworth by railroad from other cities and towns (R. 13). All such packages are forwarded from Leavenworth or brought to Leavenworth over the Rock Island Railroad (R. 13). This railroad runs in Missouri along the east, or Missouri side of the Missouri River from St. Joseph to Kansas City (R. 14). From a point opposite Leavenworth a short branch line extends across the river to Leavenworth, Kansas. The following sketch illustrates the transportation routes involved:


← TO DENVER COL.
ST. JOSEPH
MISSOURI
ATCHISON
RUSHVILLE
KANSAS
RIVER
LEAVENWORTH
BEVERLY
EDGERTON JCT.
TO CHICAGO →
TOPEKA
TO CHICAGO →
KANSAS CITY KAN.
KANSAS CITY MO.
TO

Every package handled by the Express Company in Leavenworth is either brought from or carried into Missouri over the short branch line. The Express Company has no other means of forwarding or receiving its Leavenworth business (R. 14, 15).

Although all packages handled by the Express Company at Leavenworth are brought in from Missouri or sent out into Missouri, a small fraction (less than 10 per cent) of this business originates in Kansas, is carried through the State of Missouri, transferred, and thereafter brought back into Kansas for delivery. That is to say, a small part of the business at Leavenworth is business between points in Kansas which travels outside of the State of Kansas for a large part of the route (R. 13-16).

A Leavenworth ordinance provides that no company shall transact an express business in Leavenworth without a license. The ordinance excepts from its scope all interstate business and is so worded as to apply only to transportation within the State of Kansas. The ordinance provides as follows (R. 6-10):

"Be it ordained by the Mayor and Councilmen of the City of Leavenworth:

Section 1. That no person, firm or corporation either as principal or agent, shall carry on or conduct or manage any business, occupation, trade, profession, or calling hereinafter mentioned within the City of Leavenworth, without first paying into the City Treasury the sums named hereinafter, and taking a license therefor as provided in the Ordinance.

Section 2. * * The sum of fifty dollars per year on the business and occupation of Express Company, corporation, or Agency, in receiving packages in this

City from persons in the city and transmitting the same by express from this City within this State to persons and places within this state, and receiving in this City packages by express transmitted within the State from persons and places in this state to persons within this City and delivering the same to persons in this City excepting the receipt, transmission and delivery of any such packages to and from any department, agency or agent of the United States, and excepting the receipt, transmission and delivery of any such packages which are interstate commerce; the business and occupation of receiving, transmitting and delivering of the packages herein excepted is not taxed hereby

Section 4. Every person, firm or corporation required by this ordinance to pay a license tax shall pay the same to the City Treasurer before conducting or carrying on such business, occupation or calling, except payments which are to be made in advance of the time of exercising such privilege and shall take a receipt therefor and deposit the same with the City Clerk who shall issue a license to such persons signed by himself and the Mayor of the City, describing the business, occupation or profession for which such license shall be given.

Section 5. Every person who shall violate any of the provisions of this ordinance shall, on conviction thereof, be deemed guilty of a misdemeanor and be fined in any sum not less than the amount of the license required to be paid, nor more than double the amount thereof.

Approved July 17th, 1902.

JEPTHA D. RYAN,
Mayor."

The Express Company refused to purchase a license, because its business in Leavenworth is solely interstate transportation. Agent Ewing was thereupon, on April 6, 1908, arrested. (R. 4-6). The complaint upon which he was arrested alleges that he was doing an express business other than interstate business at Leavenworth (R. 5.) He was convicted and fined $50. (R. 4). Appeal was taken to the District Court of Leavenworth County (R. 3, 4). The case was retried before a judge of the District Court on June 9, 1908 (R. 10). All of the evidence in the case is printed on pages 11 to 16 of the transcript.

June 27, 1908, the District Judge rendered his decision adjudging the defendant guilty and ordering a fine of $50 (R. 16). The District Court adjudged that "the defendant Ralph Ewing is guilty of conducting and carrying on, as agent of the United States Express Company, an express business within the City of Leavenworth without having paid for and obtained a license therefor, as charged in the complaint filed in this action, and that the defendant pay a fine of $50 to the City of Leavenworth, as well as the costs of this action, taxed at $....., and that the defendant stand committed to jail until such fine and costs are paid." (R. 18).

Appeal was taken to the Supreme Court of Kansas (R. 1, 20). It was assigned, as error that the conviction is invalid, because the only business done by the Express Company at Leavenworth is interstate transportation (R. 2, 24).

The judgment of conviction was affirmed by the Supreme Court of Kansas April 10, 1909 (R. 23). That Court said (R. 24-28):

"It is contended that the ordinance imposes a tax and burden upon interstate commerce and is therefore

invalid. * * The declared purpose of the statute as well as its operation and effect is the laying of a tax on business which is purely domestic, and of the good faith of the legislation there can be no doubt."

The court then referred to that part of the express business which is transacted betwen points in Kansas, but which travels through Missouri in transit, and said: "This part of the business, it would seem, is intercourse between people in Kansas and places in Kansas and cannot for purposes of taxation be regarded as commerce between states."

In brief, the Court decided that shipments between points in Kansas which go outside of the State in transit cannot, for purposes of taxation, be regarded as interstate commerce, and that the Express Company must get a city license before it can handle such shipments in Leavenworth.

Defendant petitioned the Supreme Court of Kansas for a rehearing, which petition was denied. (R. 28, 35). Thereupon he petitioned for a writ of error from this Court directed to the Supreme Court of Kansas, assigning as error that the ordinance as construed is an unconstitutional burden upon interstate commerce. (R. 36-38).

The question presented is, therefore, whether or not, the Express Company may be compelled to buy a city license, before it may handle in Leavenworth, packages forwarded by it from Leavenworth to other places in Kansas, or from other places in Kansas to Leavenworth, which packages are necessarily carried through the State of Missouri. It is the contention of the Express Company that such business is interstate transportation, and that the city may not prohibit or burden the transaction of such business.

The question will be discussed under the following headings:

First. The transportation of express packages between Leavenworth, Kansas, and other stations in Kansas, over railroad lines a large part of which are in Missouri is interstate commerce.

Second. The ordinance, as construed by the Supreme Court of Kansas, is invalid because it requires an express company to take out a license to conduct interstate commerce.

Third. The license tax specified in the ordinance is invalid, because it is a burden on interstate commerce. It is directly imposed upon the right to do the business. It is not a property tax measured by the amount of receipts. It cannot, therefore be sustained upon the authority of those cases which hold that a state may collect a property tax based on receipts from interstate transportation.

First. The transportation of express packages between Leavenworth, Kansas, and other stations in Kansas, over railroad lines a large part of which are in Missouri, is interstate commerce.

The Express Company receives and delivers express packages at Leavenworth. These packages are forwarded to and from Leavenworth over the lines of the Rock Island Railroad (R. 13). The railroad reaches Leavenworth from the State of Missouri over a bridge across the Missouri River. The railroad branch extends from the main line in Missouri to the river, crosses the river into Leavenworth, Kansas, and stops there. The Company does not transact a local business in Leavenworth—that is to say, it does not receive at Leavenworth any packages to be delivered at Leaven-

worth (R. 16). Every package, therefore, handled at Leavenworth, passes over the Missouri River, and is transported through the State of Missouri (R. 14-15). A fraction of this business (about 10 per cent) after travelling through Missouri is transferred and sent back to other points in Kansas, over other lines and branches (R. 15-16). For example, a package picked up at Leavenworth and destined to Kansas City, Kansas, would be loaded on a Rock Island train at Leavenworth, carried across the Missouri River and through Missouri to Kansas City, Missouri; it would there be transferred to another express company which would carry it to Kansas City, Kansas, and there deliver it. About three miles of this route would lie within the State of Kansas (R. 14).

In *Hanley vs. Kansas City Southern Railway Company* (187 U. S. 617), this Court held that the transportation of goods from Fort Smith, Arkansas, to Grannis, Arkansas, over a railroad, a part of whose lines extend into Indian Territory, is interstate commerce. This decision was based upon the definition of Mr. Justice Field in *Pacific Coast Steamship Company vs. Railroad Commissioners* (9 Sawyer, 253): "To bring the transportation within the control of the State as part of its domestic commerce, the subject transported must be within the entire field under the exclusive jurisdiction of the State." In the Hanley case, this Court sustained a decree enjoining the Railroad Commissioners of Arkansas against enforcing rates for trasportation between points in Arkansas, passing out of the State in transit. Mr. Justice Holmes said (p. 620): "The transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the

State. Suppose that the Indian Territory were a State and should try to regulate this traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian Territory, it would have it equally as against the State of Arkansas. If one could not regulate it the other could not."

From the above it is evident that Leavenworth claims the right to license express business which the State of Kansas has no power to regulate. In *Leloup v. Mobile* (127 U. S., 640, 645), this Court said, referring to the effect of a similar ordinance upon interstate business: "Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether." In this case, therefore, Kansas attempts to regulate or prohibit, by a license ordinance, a business which is under the exclusive control of Congress.

The Supreme Court of Kansas admits that Leavenworth may not license interstate commerce. (R. 25.) It holds the license valid on the assumption that the business is not interstate for the purposes of taxation. It states: (R. 26.) "The declared purpose of the statute (ordinance) as well as its operation and effect is to lay a tax on business which is purely domestic. * * * This part of the business, it would seem, is intercourse between people in Kansas and between places in Kansas and cannot for purposes of taxation be regarded as commerce between states."

In *Lehigh Valley v. Pennsylvania* (145 U. S., 192), a tax measured by a proportion of the receipts from

interstate transportation was sustained. Such a tax had already been held valid in *Maine v. Grand Trunk* (142 U. S., 217). The Lehigh decision considers at some length transportation between two points in a state passing out of the state in transit. As to such business, it is stated (p. 202): "The question * * * is simply whether in the carriage of freight and passengers between two points in one State the mere passage over the soil of another State renders that business foreign, which is domestic. We do not think that such a view can be reasonably entertained and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk." This decision was relied on by railroad commissions as authorizing state control of such business. But the Hanley case (187 U. S., 617) holds that the railroad commissions carried their conclusions too far, and dispels any doubt, as to the character of the business, which the Lehigh decision may have impelled.

But the Supreme Court of Kansas interprets these two decisions to mean, that the business is interstate for rate fixing purposes, and not interstate for taxing purposes. This Court, however, made no such distinction. It is expressly stated in the Hanley decision, that the validity of the tax in the Lehigh case does not rest on the assumption that the business is not interstate. Mr. Justice Holmes said (*Hanley vs. Railway*, 187 U. S., 617, 621):

"There are some later state decisions contrary to those last cited. *Campbell v. Chicago, Milwaukee & St. Paul Railway Co.*, 86 Iowa, 587; *Seawell v. Kansas City, Ft. Scott & Memphis Railroad Co.*, 119 Missouri, 222; *Railroad Commissioners v. Western Union Tele-*

graph Co., 113 No. Car. 213. But these decisions were made simply out of deference to conclusions drawn from *Lehigh Valley Railroad Co. v. Pennsylvania*, 145 U. S. 192, and we are of opinion that they carry their conclusions too far. That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S. 204. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax "was determined in respect of receipts for the proportion of the transportation within the State." 145 U. S. 201. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

Second. The ordinance as construed by the Supreme Court of Kansas is invalid because it requires an express company to take out a license to conduct interstate commerce.

Agent Ewing was arrested because he attempted to collect and deliver at Leavenworth packages which were being handled in interstate commerce. The City claims the right thus to prevent him from carrying on interstate business unless he pays a license tax and gets

a license. In *Crutcher vs. Kentucky*, (141 U. S. 47, at 57), this Court said:

"If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate business is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States."

In that case, a law of Kentucky requiring from the agent of every express company a license before he could carry on any business in Kentucky was held invalid. The clear doctrine of the Crutcher case is that the power of Congress over interstate commerce is absolute, and that a State cannot control or burden such commerce by exacting a license as a condition precedent to the transaction thereof.

Third. The license tax specified in the ordinance is invalid because it is a burden on interstate commerce. It is directly imposed upon the right to do the business. It is not a property tax measured by the amount of receipts. It can not, therefore, be sustained upon the authority of those cases which hold that a state may collect a property tax based on receipts from interstate transportation.

In *Leloup vs. Port of Mobile*, (127 U. S. 640), it is held that a city ordinance is invalid which

imposes a license tax upon interstate business. As in the present case, the tax was on the privilege of doing the business. This Court said::

"(P. 645). The question is squarely presented to us, therefore, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress passed July 24th, 1866, and other acts incorporated in Title LXV of the Revised Statutes? Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. * * * (P. 646) In the present case, it is true, the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages. * * * (P. 648) In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

There is but one point of distinction between the Leloup case and the present case: the Leloup case in-

volved a license imposed on all the business of a company; the Leavenworth ordinance applies only to that class of the Express Company's business which originates in Kansas, passes through Missouri, and comes back into Kansas for delivery. Let us therefore apply the words above quoted to that class of business: (Italics are ours). "Can a State prohibit such a company from doing *such a business* within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, *it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.* * * * No State has the right to lay a tax on interstate commerce *in any form*, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

We have already referred to the improper application to this case, of the decision in the case of *Lehigh Valley v. Pennsylvania* (145 U. S. 192). That case was decided before the decision in *Hanley v. Railway* (187 U. S. 617) had clearly pointed out that business between two points in one state passing out of that State in transit is interstate commerce. In the *Hanley decision* it is shown that the tax involved in the *Lehigh case* is valid, not because the transportation is under state control, but because the tax "is determined in respect of receipts for the proportion of the transportation within the State." Citing *Maine v. Grand Trunk Railway Company* (142 U. S. 217). (*Hanley v. Railway*, 187 U. S. 617, 621).

In the Maine case, the tax was upon the franchises which the Grand Trunk Railway Company received

from the State of Maine. The proportion of the Grand Trunk earnings, both state and interstate, earned within the state, was taken as a measure of the tax. The nature of the tax is clearly defined: (142 U. S. 217, 227) "The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. * * * The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government." The Maine tax is not upon interstate commerce and not upon the right to conduct interstate commerce. The tax is upon the special privilege of exercising the rights of a railroad corporation within the State of Maine. In the same way, the Pennsylvania tax involved in the *Lehigh case* (145 U. S. 192) is not upon interstate commerce and not upon the right to conduct interstate commerce. It is a property tax, measured by the receipts from transportation.

In *United States Express v. Minnesota* (223 U. S. 335) a tax measured by receipts from interstate transportation was sustained upon the authority of *Maine v. Grand Trunk* (142 U. S. 217). The Minnesota tax was held to be "part of a scheme of taxation, seeking to reach the value of the property * * * in the State, measured by the receipts from business done within the State. * * * The statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceds of interstate commerce, which could not, in itself, be taxed, and does not fall

within that class of statutes uniformly condemned in this Court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the State."

The Leavenworth ordinance is not an attempt to tax property within the City or to tax any rights or privileges extended by the State or City. As construed by the Supreme Court of Kansas, it is an attempt to license interstate transportation.

FRANK H. PLATT,
JNO. T. O'KEEFE,
For Plaintiff in Error.

GEORGE W. FIELD,
BRANCH P. KERFOOT,
on Brief.

September 10, 1912.

No. 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910

RALPH A. IRVING,

Plaintiff in Error,

vs.

THE CITY OF LEAVENWORTH,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF THE DEFENDANT IN ERROR.

IN THE

Supreme Court of the United States.

October Term, 1911.

RALPH A. EWING,
Plaintiff in Error.

vs.

THE CITY OF LEAVENWORTH,
Defendant in Error.

No. 309.

In Error to the Supreme Court of the State of Kansas.

BRIEF FOR DEFENDANT IN ERROR.

As stated in the brief of the plaintiff in error, Ralph A. Ewing, was arrested on the 25th day of March, 1908, charged with violating Ordinance No. 2367, because he, as agent of the United States Express Company, refused to pay a license tax for maintaining and carrying on in the City of Leavenworth, as the agent of said express company, the business and occupation of said express company.

He was tried in the Police Court of said city, found guilty and adjudged to pay a fine. He appealed to the District Court of Leavenworth County, Kansas, where he was again tried by the court without a jury, found

guilty, and fined, and appealed to the Supreme Court of Kansas. The judgement of the District Court of Leavenworth County was affirmed. The plaintiif in error now appeals to this Court.

We believe that the case of The City of Topeka vs. George W. Jones, reported in 74 Kan. 164, 86 Pac. Rep 162, decides every point except one raised by the plaintiff in error in this case.

The ordinance of the City of Leavenworth was copied from the ordinance of the City of Topeka and passed upon by the Supreme Court of Kansas in the Jones case, and is almost identical with it, and we submit that the points decided in the Jones case are binding in this case so far as they are identical.

We think the case at bar differs in one point only from the Jones case and that is: Does the transportation of goods and packages by continuous carriage to and from points within the City of Leavenworth to and from other points in the State of Kansas, out over a line which in its course between these points within the City of Leavenworth and other points in the State of Kansas into the State of Missouri and back into the State of Kansas, make such transportation of goods and packages interstate commerce? We believe this to be the only question in this case for the court the determine.

We contend that in the carriage of goods and packages between two points in one state, the mere passage over the soil of another state does not render such business foreign, which is otherwise domestic, so as to preclude cities in the state from levying a license tax on such portion of the business as is done within such city.

The case most strongly relied upon by the appellant to sustain his contention that such carriage of goods and packages to and from the City of Leavenworth through the State of Missouri, to and from other points in Kansas, constitutes interstate commerce is the case of Hanley vs. Kansas City Southern Railway Company, 187 U. S. 617.

That was a case in which the railroad commissioners of Arkansas attempted to fix the rates for the transportation of goods from Fort Smith in Arkansas by way of Spiro, in the Indian Territory to Grannis in Arkansas, and the Supreme Court of the United States decided that the commissioners of the State of Arkansas could not fix such rates for that portion of the route in the Indian Territory. But we think that the case at bar is clearly distinguishable from the Hanley case. In the Hanley case the commissioners attempted to fix the rates for the whole routes, while in the case at bar the City of Leavenworth taxed that portion of the business done within the City of Leavenworth, to and from points within the State of Kansas.

We think the case of The Lehigh Valley Railroad Company vs. The Commonwealth of Pennsylvania, 145 U. S. 672, is more nearly in point with the case at bar. In that case the Supreme Court decided that the State of Pennsylvania could tax that part of the receipts of the railroad company received for the transportation of goods by continuous passage from points in that state to other points in that state but partly over lines in Pennsylvania and partly over lines in other states; that such transportation was not interstate commerce and such tax was not invalid as interfering with interstate commerce. In that case the court said: "The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the tsate, but the contention is that this could not be done because the transportation was an entire thing, in its course passed through another state than that of the origin and destination of the particular freight and passengers."

So in the case at bar the tax was for "the business and occupation of express company, corporation or agency, in receiving packages in the city from persons in the city and transmitting the same by express from the city within the state to persons and places within the state, and receiving in this city packages by express transmitted within the state from persons and places in this state to persons within this city, excepting the receipt, transmission and delivery of any such packages to and from any department, agency or agent of the United

States, and excepting the receipt, transmission and delivery of any such packages which are interstate commerce. The business and occupation of receiving, transmitting and delivering of the packages herein excepted is not taxed hereby." It is expressly limited to that part of the business done and carried on within the City of Leavenworth to and from other points in the State of Kansas, and expressly excepts all interstate commerce business.

In the Lehigh Valley case at page 675 the court says, "The tax under consideration here was determined in respect of the receipts for the portion of the transportation within the state, but the contention is that this could not be done because the transportation was an entire thing and in its course passed through another state than that of the origin and destination of the particular freight and passengers.

* * * It should be remembered that the question does not arise as to the power of any other state than the state of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, but it is simply whether, in the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state renders that business foreign, which is domestic. We do not think that such a view can

be reasonably entertained, and are of the opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk." So in the case at bar the tax is levied only on that part of the business done in the City of Leavenworth. It does not attempt to levy any tax for the business done between the City of Leavenworth and points in any State other than Kansas, but the ordinance is expressly limited to intra-state business.

The ordinance in question is in the nature of a police regulation and is not considered an attempt to regulate interstate commerce and this distinction is made clear by the Supreme Court in the Hanley case, 187 U. S. 617, in which the court does not overrule the Lehigh Valley case but seeks to distinguish it from that case. In the Hanley case Mr. Justice Holmes says, page 621, "That was the case of a tax, and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside its borders. * * * * And although it was intimated that, for the purposes before the court, to some extent commerce by transportation migh have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax' was determined in respect of the receipts for the proportion of the transportation within the state.' * * * Such a proportioned tax had been sustained in the case of commerce admitted to be

interstate. * * * Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

The Supreme Court of Virginia in sustaining a judgment of a lower for damages for delay in sending and receiving a message, says that where the points of transmission and termination are in the same state the mere fact that the message in its course passes over the soil of another state does not make the message interstate commerce and that a state statute providing a penalty for delay does not interfere with interstate commerce. In the opinion the court says, "When the points of transmission and termination of a telegram sent out over the lines of a single company were within the same state, the fact that a part of the transmission was made over lines of the company in another state, did not make the same interstate business, nor prevent it from being subject to a state statute providing a penalty for delay."

And in speaking of the distinction between the Hanley case and the case under consideration the court further says, "The distinction between that case and the case at bar is obvious. In the latter case there is no attempt to fix and enforce rates for the transmission of telegrams, but the court simply upheld the recovery of a penalty, imposed by the statute upon a telegraph company doing business in the state, for failure to transmit

faithfully and impartially and as promptly as practical, a telegram, in accordance with its contract. This principle was distinctly recognized and sustained by the Supreme Court of the United States in considering a similar statute of the state of Georgia in the case of Western Union Telegraph Company vs. Jones, 162 U. S. 650, the authority of which is in no wise impaired by the case referred to. * * * The case in judgment in our opinion involves the exercise of an important police power of the state, a power which ought not to be surrendered, in the absence of a direct and authoritative declaration on the part of the Supreme Court of the United States that it is violative of the Federal constitution."

Western Union Tel. Co., vs. Hughes, 104 Va. 240; 51 S. E. Rep. 225.

In the case of Patterson vs. Missouri Pacific Railway Company, 77 Kan. 94 Pac. Rep. 138, Mr. Justice Smith, in sustaining a statute of the State of Kansas providing a penalty for delay in furnishing cars, uses the following language:

"The right of the state to impose reasonable police regulations for the safety and protection of citizens of the state and of their business and property upon railroads operating within and receiving protection and other benefits from the state, even though such railroads may at the time be engaged in interstate commerce, is unquestioned, even though such regulations may impose some slight burdens upon interstate commerce. As before said, the Supreme Court of the United States is the final arbiter as to whether the regulations are reasonable and whether

they impose an unreasonable burden upon interstate commerce. Each being considered, in a generous spirit, upon its own merits, there is and can be no general rule."

Considering the facts in the case at bar and in view of the authorities cited above we contend that the business of the express company taxed under the ordinance is not interstate commerce, and also that the City of Leavenworth had the right to levy the tax as a police regulation as decided in the case of Patterson vs. Missouri Pacific Railway Company, supra.

We therefore submit that the judgment of the lower court should be affirmed.

Arthur M. Jackson.

BENJAMIN F. ENDRES,

City Attorney and Attorney for Defendant in Error.

November 27th, 1912.